DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 86-877-CFY
Status: GRANTED

Docketed:
December 1, 1986

Title: United States, Petitioner
v.
James Joseph Owens

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Ides, Allan

Entry	Date	Note	Proceedings and Orders
1	Oct 17 1986		Application for extension of time to file petition and order granting same until December 1, 1986 (O'Connor, October 20, 1986).
2	Dec 1 1986	G	Petition for writ of certiorari filed.
3	Oct 17 1986		Response received to above application for extension of time (A-294) on October 27, 1986.
5	Dec 22 1986		Order extending time to file response to petition until January 15, 1987.
6	Jan 14 1987		DISTRIBUTED. February 20, 1987
7	Jan 7 1987	X	Brief of respondent James J. Owens in opposition filed.
8	Jan 7 1987	G	Motion of respondent for leave to proceed in forma pauperis filed.
9	Jan 27 1987	X	Reply brief of petitioner United States filed.
11	Feb 23 1987		Motion of respondent for leave to proceed in forma pauperis GRANTED.
12	Feb 23 1987		Petition GRANTED.
			**********
13	Mar 3 1987	G	Motion of respondent for appointment of counsel filed.
14	Mar 10 1987		DISTRIBUTED. March 20, 1987. (Motion of respondent for appointment of counsel).
15	Mar 23 1987		Motion for appointment of counsel GRANTED and it is ordered that Allan Ides, Esquire, of Los Angeles, California, is appointed to serve as counsel for the respondent in this case.
17	Apr 8 1987		Order extending time to file brief of petitioner on the merits until April 23, 1987.
18	Apr 23 1987		Joint appendix filed.
19	Apr 23 1987		Brief of petitioner United States filed.
21	May 18 1987		Order extending time to file brief of respondent on the merits until June 8, 1987.
22	May 19 1987		Record filed.
23	May 19 1987		Certified copy of original record and proceedings, 14 volumes, received.
24	Jun 18 1987		Brief of respondent James J. Owens filed.
25	Jul 2 1987		CIRCULATED.
26	Aug 31 1987		SET FOR ARGUMENT. Wednesday, November 4, 1987. (2nd case).
27	Oct 27 1987	X	Reply brief of petitioner United States filed.
28	Nov 4 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-877

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES JOSEPH OWENS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
ROBERT H. KLONOFF
Assistant to the Solicitor General
JOHN F. DE PUE
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

62 pp

QUESTIONS PRESENTED

1. Whether the Confrontation Clause was violated as a result of the in-court testimony of an assault victim, who recalled in detail his pretrial identification of respondent as his assailant but who could not remember certain details of the assault itself.

2. Whether Fed. R. Evid. 801(d)(1)(C) bars an assault victim from testifying at trial about his out-of-court identification of his assailant, when the victim has suffered a partial memory loss concerning the assault but has a full recollection of the identification.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES JOSEPH OWENS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra,* 1a-30a) is reported at 789 F.2d 750.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 31a) was entered on May 12, 1986. A petition for rehearing was denied on September 2, 1986 (App., *infra,* 32a). On October 20, 1986, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including December 1, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

Rule 801(d) of the Federal Rules of Evidence provides in pertinent part:

> A statement is not hearsay if—(1) * * * The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * (C) one of identification of a person made after perceiving him * * *.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, respondent, a federal prisoner, was convicted of assault with intent to commit murder, in violation of 18 U.S.C. 113(a). He was sentenced to 20 years' imprisonment, to be served consecutively to the sentence he was already serving.

1. The evidence at trial showed that on the morning of April 12, 1982, 61 year-old John Foster, a correctional counselor at the federal prison in Lompoc, California, was assaulted and beaten with a metal pipe. In an effort to prove that it was respondent who beat Foster, the government called 14 witnesses, including Foster, three inmate eyewitnesses, and an inmate to whom respondent made inculpatory statements about the crime. The government also introduced physical evidence, including clothing belonging to respondent that contained blood spots matching Foster's blood type.

a. The government's evidence revealed that on the day before the attack, several inmates discussed a plan to attack Foster. On that day, respondent attended a meeting of a

prison religious group, called the "Moorish Science Temple of America" (the Moors). During the meeting, one of the inmates stated that "a move would have to be made in order to gain some kind of respect." He added that he was "tired of [Foster] fucking with [him]." Respondent, who was one of the leaders of the Moors, repeated those observations and expressed agreement with them. 4 Tr. 120-121, 126-128; 6 Tr. 141.

The next morning, Foster arrived for work at the Lompoc prison at about 5:35 a.m. and went to his office at the prison's "J" unit. Shortly after 6:00 a.m., he was instructed to release the 90 inmates in the J unit for breakfast. After doing so, Foster went to the unit's television room to check for contraband. While he was inside the television room, Foster was struck several times on the face, head, and upper body. 2 Tr. 80-81, 85-90, 133-136.

Inmate Bowers was one of the three inmate eyewitnesses to the assault who testified at trial. On the morning of the assault, Bowers was on a landing near the J unit television room when he saw inmates Melvin Davis and Cecil Curry, whom he had seen the day before at the Moors' meeting. After one of them told Bowers that he "shouldn't be coming up here," Bowers heard a "shuffling-like noise" coming from the room. Upon opening the door, Bowers saw Foster lying on the floor, shaking and going into convulsions. Respondent was standing over Foster holding a metal pipe. When he saw Bowers, respondent asked him what he was doing there, swung something at him, and ran out the door. 4 Tr. 120, 136-142.

Inmate Albert Washington also witnessed the assault. While on his way to the laundry room on the morning of the assault, Washington heard crying or moaning sounds coming from the television room. He looked through the window of the room and observed respondent, who was

wearing a gray sweatshirt, repeatedly strike Foster on the arm with a pipe. Washington also saw Curry and Davis at the scene of assault. 1 Tr. 238-249, 269.

Inmate Michael Jeffery also witnessed the incident. Jeffery was taking a shower when he heard a "gurgling, loud strangling noise." Jeffery left the shower and went to the door of the television room and looked inside, where he observed respondent repeatedly strike Foster with a "long round object" that "could have been a pipe." After returning to the shower, Jeffery saw respondent enter an adjacent mop room. He then heard respondent tell Davis to throw respondent's sweatsuit top out the window. Jeffery watched as Davis appeared to do so. 3 Tr. 16-21, 24-26.

During the assault, Foster set off the body alarm that he was carrying with him. Prison officials discovered Foster in the television room lying in a pool of blood, and they immediately rushed him to the hospital. 1 Tr. 198-201; 2 Tr. 96.

Following the assault, prison officials found a bloody metal pipe in the prison yard, a sweatsuit top outside the mop room window (where Jeffery had seen the garment thrown), and a pair of khaki trousers in an unassigned J unit cell. Blood stains on both the sweatsuit and trousers matched Foster's blood type. 2 Tr. 136; 3 Tr. 118; 4 Tr. 101-104, 253, 255-256. Washington identified the sweatshirt as the one worn by respondent during the assault; Jeffery identified it as the one he saw Davis throw out the window at respondent's direction; and a prison official recognized it as one worn by respondent on a daily basis prior to the assault. 1 Tr. 193-195, 246-247; 3 Tr. 28. In addition, a photograph of respondent wearing what appeared to be the same sweatsuit top was found among his belongings (5 Tr. 34). The khaki pants were also identified as similar to the prison-issued pants typically worn by respondent, and when respondent tried them on at trial, they fit him (1 Tr. 195-197; 5 Tr. 10-11).

During the investigation of the assault, prison authorities placed respondent in a segregation unit. While he was there, respondent became acquainted with another inmate, Douglas Ridinger, who worked as an orderly. Approximately a week after the assault, Ridinger asked why Foster had been assaulted. Respondent replied, using words similar to those spoken at the Moors' meeting on April 11, that "this is something we have to do in order to get respect, just plain and simple." 3 Tr. 124-130, 144-145; 4 Tr. 59.

The medical evidence at trial revealed that Foster suffered fractures to his skull, cheekbone, arm, and right middle finger, as well as various other injuries. He was initially very confused and disoriented and could remember little more than his name. According to Foster's neurosurgeon, at least five hard blows with a blunt instrument were necessary to cause the head injuries alone. The neurosurgeon performed emergency surgery on the day of the assault to relieve pressure on Foster's brain caused by the fractured skull. Foster initially showed some improvement, but then began to suffer periods of confusion and disorientation. After additional surgical procedures were performed, Foster was released from the hospital on May 10, 1982. 2 Tr. 133-138, 142-143, 156-157, 162-165, 172-175.

During his hospital stay, Foster was visited by Dr. Ted Bader, the prison physician. As Dr. Bader recounted at trial, when he asked Foster who had assaulted him, Foster responded, without hesitation, "I think it was Owens, the D.C. black" (2 Tr. 207-208). FBI Agent Thomas G. Mansfield, who was investigating the assault, learned about Foster's statement and attempted to interview him. Foster appeared lethargic and groggy, however, and when Mansfield asked who had assaulted him, Foster's only response was a word that sounded like "coma." Five days prior to Foster's release from the hospital, Mansfield inter-

viewed him again, This time, according to Agent Mansfield's testimony, Foster's condition had improved substantially. Foster, who was alert and coherent, described how the attack had occurred, said that Owens was his assailant, and selected Owens' photograph from a photospread. 5 Tr. 22-25.

b. Foster testified at length at the trial (2 Tr. 71-131).[1] After describing his professional background (2 Tr. 72-79), Foster testified that he knew respondent as an inmate of the J unit (2 Tr. 80). He recalled that, on the morning of April 12, 1982, he arrived at the prison at 5:35. He first obtained a body alarm and the keys to the J unit. He then went to the counselor's office in the unit, where he made a pot of coffee and recorded the inmate count in a logbook. Shortly after 6:00 a.m., he was called by a superior and instructed to begin feeding the prisoners. Foster opened the doors to each range of cells, and he entered the J unit television room to inspect it for contraband. Shortly after entering the room, he felt an impact on his head. Although he could not remember the identity of the person who struck him, he recalled that his assailant was armed with a piece of pipe. He also recalled that,

[1] At the commencement of the trial, respondent's attorneys objected to the introduction of evidence concerning Foster's out-of-court identification. They stated that when they interviewed Foster, he said he could not recall the identity of his assailant and could not remember why he told Mansfield that it was respondent. They argued that Foster therefore was not subject to cross-examination concerning his out-of-court identification. 12/12/83 Tr. 26-33; 1 Tr. 5-6. The district court overruled the objection and denied respondent's motion for a hearing concerning Foster's present recollection (1 Tr. 3-6). The court of appeals stated (App., *infra*, 7a n.4) that the government's offer of proof differed substantially from Foster's testimony at trial, and it suggested that Foster's memory loss was in fact far worse than the offer of proof had indicated. In fact, however, the offer of proof was accurate, as respondent conceded below (Owens C.A. Br. 7).

following the assault, he looked down and saw blood on the floor. Foster testified that his injuries included a fractured skull, cuts and bruises, and a broken arm. Foster also recalled injuring his right middle finger when he jammed it into his assailant's chest. 2 Tr. 81-93, 100.

Foster explained that the next thing he remembered after being hit was waking up at the hospital. The one hospital visit he recalled at trial was a visit by Agent Mansfield. 2 Tr. 90-92, 94-95. Foster testifed that "[a]s to what I told Mr. Mansfield that day, it is very vivid in my mind" (*id.* at 96; see also *id.* at 91-92). In particular, Foster remembered telling Mansfield that "after I was hit I looked down and saw the blood on the floor, and jammed my finger into Owens' chest, and said, 'That's enough of that,' and hit my alarm button" (*ibid.*). He indicated, moreover, that at the time he spoke to Mansfield, there was no doubt in his mind that what he said was accurate. In addition, Foster recalled that Mansfied asked him to identify his assailant from a group of photographs and that he selected respondent's picture. 2 Tr. 96-97.

Foster was subjected to extensive cross-examination, during which he acknowledged that "[a]t this time he [did not] remember" seeing his assailant (2 Tr. 100). In response to defense counsel's inquiries, he also conceded that while his statement to Mansfield was "vivid," he could not recall making any other statements during his stay at the hospital, and he did not remember asking (as noted in a medical report) who his assailant was or whether it was "Leo" (2 Tr. 102, 105, 109). He admitted that, although many people, including his wife, had apparently visited him during his hospital stay, he did not recall any of the visits except the visit by Mansfield that he had described (2 Tr. 110-111, 114). Foster stated that the assault was "vivid in [his] mind when [he] had given the information to Mr. Mansfield," but he was unable to explain the basis for his identification (2 Tr. 114).

During summation, respondent's attorney emphasized Foster's testimony about his loss of memory, as elicited during cross-examination. She argued that Foster had admitted that he could not recall seeing his assailant and could not remember why he had told Mansfield that respondent had committed the assault. From that she suggested that Foster probably had made the identification as the result of suggestions by persons who had visited him in the hospital. 7 Tr. 59-66.

2. On appeal, respondent renewed his challenge to the admission of Foster's out-of-court identification. The Ninth Circuit reversed respondent's conviction by a divided vote, holding that because of Foster's memory loss, the defense was unable to cross-examine him effectively (App., *infra*, 1a-23a). Although the court recognized that respondent's attorneys were "not restricted in their questioning of Foster" on the relevant issues (*id.* at 11a), it determined (*id.* at 15a) that Foster's responses did not give the jury "the information it needed in order to determine whether Foster had perceived his attacker, accurately or at all, or whether at the time he made the identification, his memory correctly reflected his perceptions." The court (*id.* at 17a-18a) explicitly rejected the approach taken by the Third Circuit in *United States ex rel. Thomas* v. *Cuyler*, 548 F.2d 460, 463 (3d Cir. 1977), which held that the Confrontation Clause is not violated if the witness is sworn and agrees to testify, even if he asserts an actual or feigned memory loss at trial.

In addition, the court of appeals held (App., *infra*, 8a-11a) that the admission of Foster's pretrial identification violated Fed. R. Evid. 801(d)(1)(C). The court construed Rule 801(d)(1)(C) to require cross-examination not only about the identification itself, but also about "the facts and circumstances *underlying* the identification," namely, "the reasons why [the declarant] made the identification" (App., *infra*, 9a (emphasis in the original)). The

court held that because of Foster's memory loss, respondent was prevented from adequately exploring the basis for the pretrial identification (*id.* at 11a).

The court concluded that the violation of Rule 801(d)(1)(C) was harmless under the standard applicable to non-constitutional errors, in light of the testimony of the inmate eyewitnesses, the evidence of respondent's inculpatory remarks concerning the assault, and the physical evidence linking respondent to the crime (App., *infra*, 12a). The court ruled, however, that the violation of the Confrontation Clause was *not* harmless under the standard applicable to constitutional errors. Because the court could not find that the Confrontation Clause violation was harmless beyond a reasonable doubt, it reversed respondent's conviction (*id.* at 22a-23a).

Judge Boochever dissented. In his view, both the Confrontation Clause and Fed. R. Evid. 801(d)(1)(C) require only that the witness be subject to cross-examination concerning the out-of-court statement itself, not that he be subject to cross-examination concerning the circumstances underlying the identification. That requirement was met because Foster had a complete recollection of his statement to Mansfield, even if he did not remember why he was able to identify respondent. App., *infra*, 25a-26a. Judge Boochever also observed (*id.* at 26a-27a, 29a) that, as a result of the cross-examination conducted by respondent's attorney at trial, the jury had an adequate basis to assess Foster's demeanor and determine whether to credit his out-of-court identification. [2]

---

[2] Judge Boochever indicated (App, *infra*, 24a-25a), however, that he would remand the case to the district court for a determination under Fed. R. Evid. 602 whether Foster had personal knowledge of the identity of his assailant.

REASONS FOR GRANTING THE PETITION

This case presents issues of great practical importance. In virtually every criminal trial, prosecution witnesses experience some loss of memory concerning disputed facts. Yet, until the present case, the courts have repeatedly rejected assertions of a Confrontation Clause violation when a witness recalls some relevant facts but asserts a memory loss as to others. The Ninth Circuit's holding that Foster's partial memory loss deprived respondent of his confrontation right raises disturbing questions in a variety of previously well-settled areas. For example, the introduction of records or memoranda under the past recollection recorded exception to the hearsay rule (see Fed. R. Evid. 803(5))—which is applicable when the witness "has insufficient recollection [of the matter recorded] to enable him to testify fully and accurately"—occurs on a daily basis in state and federal courts. Similarly, witnesses regularly testify about pretrial identifications of suspects under Fed. R. Evid. 801(d)(1)(C), even though they are unable to make in-court identifications at trial. And prior inconsistent statements are routinely admitted, pursuant to Fed. R. Evid. 801(d)(1)(A), notwithstanding a witness's partial memory loss concerning the prior statement. The present case calls into question the constitutionality of those previously routine evidentiary procedures.

1.a. This Court has never found a violation of the Confrontation Clause based on the loss of memory by a witness who testified at trial. As the Court held recently in *Delaware* v. *Fensterer*, No. 85-214 (Nov. 4, 1985), mere loss of memory by a witness does not deprive the defendant of his right to confront the witness; as long as the witness is available for cross-examination at trial, the Confrontation Clause is satisfied. The Court in *Fensterer* noted (slip op. 6) that the Confrontation Clause "includes

no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion or evasion."

The *Fensterer* case involved an expert for the prosecution who could not remember what scientific method he had used to reach his conclusion about an evidentiary issue in the case; the Delaware Supreme Court reversed the defendant's conviction on Confrontation Clause grounds (493 A.2d 959 (1985)), holding that in light of the lapse in the expert's recollection, the defendant's cross-examination of the expert was "nothing more than an exercise in futility" (*id.* at 964). In reversing, this Court emphasized (slip op. 6-7) that the Confrontation Clause was satisfied because the defense was able to expose the memory loss and show the jury why the expert's testimony deserved little weight. Although defense counsel in this case had the same opportunity to impeach Foster with his loss of memory about the identity of his assailant, the court of appeals, like the Delaware Supreme Court, regarded that opportunity as insufficient to satisfy the Confrontation Clause.

The court of appeals sought to distinguish *Fensterer* on the ground that it did not involve a failure of recollection with regard to an out-of-court statement (App., *infra*, 12a-13a n.7). While that is so, it is not clear why that distinction should make a difference for Confrontation Clause purposes. In *Fensterer*, the expert testified about the results of his out-of-court analysis, but he was unable to recall the circumstances that led him to reach that conclusion. In this case, Foster testified about the results of his prior identification of his assailant, but he was unable to recall the circumstances that led him to make that identification. Although the identification evidence and the expert testimony may stand differently for hearsay purposes, there is no reason to treat them differently for purposes of the Confrontation Clause. In each case, the defendant has

the witness on the stand for cross-examination and at a minimum can exploit the witness's failure of recollection to undermine the force of his testimony with the finder of fact.

In both *Fensterer* (slip op. 6) and this Court's prior decision in *California* v. *Green*, 399 U.S. 149, 168-169 (1970), the Court raised but did not reach the question whether an out-of-court statement can be admitted, consistent with the Confrontation Clause, when the declarant asserts a total or partial failure of recollection with regard to the circumstances underlying the statement.[3] This case presents the Court with an opportunity to resolve that question by determining whether, as we believe, the analysis of *Fensterer* applies in the context of witnesses' out-of-court statements.

b. The court of appeals' decision also creates a conflict among the circuits concerning the constitutional significance of a witness's memory loss. The court of appeals took the position that the Confrontation Clause bars the admission of an out-of-court statement by a testifying declarant if the declarant experiences a significant memory

[3] In *Green*, a minor named Porter had informed the police that Green supplied him with drugs. At trial, Porter claimed that he could not recall the identity of his supplier. The Court upheld the admission of Porter's preliminary hearing testimony at trial because Porter was sworn and subject to cross-examination at the prior proceeding. However, the Court remanded the case to the California Supreme Court on the question whether there was error in admitting Porter's out-of-court statement to the police, noting that it was premature for the Court to decide "[w]hether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause * * *" (399 U.S. at 168). On remand, the California Supreme Court concluded that Porter's statement to the police was properly admitted because Porter testified at trial under oath, was subject to cross-examination, and the jury was able to observe his demeanor. *People* v. *Green*, 3 Cal. 3d 981, 92 Cal. Rptr. 494, 479 P.2d 998, cert. dismissed, 404 U.S. 801 (1971).

loss with regard to the subject matter of the out-of-court statement. In so holding, the court (App., *infra*, 17a) explicitly refused to adopt the Third Circuit's analysis in *United States ex rel. Thomas* v. *Cuyler, supra*. The Third Circuit in the *Thomas* case held that the admission of the witness's out-of-court statement did not violate the Confrontation Clause, even though the witness alleged a complete lack of recollection about the facts he had related in his out-of-court statement. The Confrontation Clause is not violated, the court held, as long as the witness is sworn and does not refuse to answer questions, notwithstanding an actual or feigned memory loss (548 F.2d at 463). The Third Circuit's approach was based on Justice Harlan's concurring opinion in *California* v. *Green*, 399 U.S. at 172-189. In *Green*, Justice Harlan stated his view (*id.* at 188) that if a witness is physically present at trial, the fact that he "cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence." [4] Justice Harlan's approach has also been en-

[4] The court of appeals asserted (App., *infra*, 18a) that Justice Harlan repudiated his approach in *Green* a year later in *Dutton* v. *Evans*, 400 U.S. 74, 93-100 (1970). That characterization seriously misreads Justice Harlan's position in those two cases. In *Evans*, Justice Harlan indicated that he was retreating from his suggestion in *Green* that the government has an obligation to produce witnesses who are reasonably available. His revised view was that the Confrontation Clause simply gives a defendant an opportunity to cross-examine those witnesses who are actually produced by the government, and that the admission of hearsay where the declarant is not produced should be evaluated under a due process standard of fundamental fairness. That view can in no way be read as a repudiation by Justice Harlan of his position in *Green* that a witness's memory loss has no Sixth Amendment significance.

The court of appeals also asserted that this Court rejected Justice Harlan's approach in a footnote in *Ohio* v. *Roberts*, 448 U.S. 56, 66 n.9 (1980) (App., *infra*, 18a). The cited footnote in *Roberts*, however,

dorsed by the Colorado Supreme Court. See *People* v. *Pepper,* 193 Colo. 505, 568 P.2d 446 (1977) (en banc); see also *Robinson* v. *State,* 102 Wis.2d 343, 353, 306 N.W. 2d 668, 673 (1981) (noting in dictum that it might well endorse Justice Harlan's approach in *Green* in an appropriate case).

Other circuits that have addressed the issue, while not adopting the *per se* approach taken by the Third Circuit, have similarly refused to attach Sixth Amendment significance to a witness's total or partial memory loss. Those decisions are likewise inconsistent with the Ninth Circuit's decision in the present case. For example, in *United States* v. *Payne,* 492 F.2d 449, 453-454 (4th Cir.), cert denied, 419 U.S. 876 (1974), the court of appeals upheld the admission of a prior statement of the witness, even though the witness claimed complete loss of memory about the facts related in the statement. Citing with approval Justice Harlan's concurring opinion in *Green,* the court of appeals noted that even though the witness's complete loss of memory frustrated defense inquiry regarding the truth of the prior statement, the admission of the statement nonetheless did not violate the Confrontation Clause. The court pointed out that the case of complete memory loss differs only in degree from a case in which "a declarant has made a detailed earlier statement and at the trial, despite efforts to refresh his recollection, remembers

---

does not constitute a rejection of Justice Harlan's approach to the role of a witness's memory loss in Confrontation Clause analysis. Rather, the Court was simply noting that it had not adopted Justice Harlan's general thesis that the "Confrontation Clause requires only that the prosecution produce available witnesses" (448 U.S. at 67 n.9). Indeed, in *Fensterer,* a post-*Roberts* case, the Court (slip op. 6) left open whether a witness's memory loss could ever amount to a Confrontation Clause violation. And the Ninth Circuit, in another case, has explicitly stated that *Roberts* did *not* decide the memory loss issue discussed by Justice Harlan in *Green* (*Thomas* v. *Cardwell,* 626 F.2d 1375, 1385 n.33 (1980), cert. denied, 449 U.S. 1089 (1981)).

only some, but not all, of the details." 492 F.2d at 454. If the defendant's constitutional claim were correct, the court added, logic would require that in such a case, every portion of the prior statement about which the declarant had suffered a loss of memory would have to be excluded. *Ibid.*

Similary, in *United States* v. *Insana*, 423 F.2d 1165, 1168 (2d Cir.), cert. denied, 400 U.S. 841 (1970), the court permitted the government to introduce a witness's prior statement when the witness at trial claimed a nearly complete lack of memory regarding the subject of his prior statement. The Confrontation Clause was satisfied, the court concluded, because the witness was at all times available for cross-examination. The fact that the defendant "believes such examination would be fruitless [does not] render the witness unavailable for such examination." 423 F.2d at 1168.

In other cases as well, the courts of appeals have held that an assertion of partial or complete loss of memory by a witness does not result in a Confrontation Clause violation, as long as the witness is available for cross-examination and the memory lapse does not completely deprive the jury of its ability to determine the veracity of the declarant's out-of-court statement. See *United States* v. *DiCaro*, 772 F.2d 1314, 1325-1328 (7th Cir. 1985), cert. denied, No. 85-1007 (Mar. 24, 1986); *United States* v. *Baker*, 722 F.2d 343, 347-349 (7th Cir. 1983), cert. denied, 465 U.S. 1037 (1984); *United States* v. *Russell*, 712 F.2d 1256, 1258 (8th Cir. 1983); *Vogel* v. *Percy*, 691 F.2d 843, 845-848 (7th Cir. 1982); *United States* v. *Distler*, 671 F.2d 954, 959 (6th Cir.), cert. denied, 454 U.S. 827 (1981); *United States* v. *Rogers*, 549 F.2d 490, 498-500 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977); *United States* v. *Infelice*, 506 F.2d 1358, 1363 (7th Cir. 1974), cert. denied, 419 U.S. 1107 (1975); see also *People* v. *Green*, 3 Cal.3d 981, 92 Cal. Rptr. 494, 479 P.2d 998 (1971), cert. dis-

missed, 404 U.S. 801 (1971); *Van Hatten* v. *State*, 666 P.2d 1047 (Alaska App. 1983); but see *State* v. *Lomax*, 227 Kan. 651, 608 P.2d 959 (1980).

We agree with Justice Harlan (*California* v. *Green*, 399 U.S. at 188) that the in-court testimony of a witness under oath and in the presence of the accused satisfies the Confrontation Clause, regardless of whether that witness has suffered a loss of memory.[5] Elicting on cross-examination that the witness cannot remember key facts in dispute does not undercut the defendant's right of cross-examination; to the contrary, it is difficult to imagine cross-examination that is more productive than where a defense attorney demonstrates a witness's failure to recall crucial information. By physically producing the witness, the government has done everything within its power to enable the defense to confront the witness and attempt to show why he should not be believed. Because the witness is present in court, the jury can observe his demeanor and assess his credibility. Nothing in the history or purpose of the Confrontation Clause suggests that it was designed to prohibit in-court testimony by a witness who cannot recall some of the facts at issue. See generally *Green*, 399 U.S. at 179 (Harlan, J., concurring) (Confrontation Clause was designed "to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee wit-

[5] Our position assumes, of course, that the scope of cross-examination has not been impermissibly restricted by the trial court. Cf. *Delaware* v. *Van Arsdall*, No. 84-1279 (Apr. 7, 1986); *Davis* v. *Alaska*, 415 U.S. 308 (1974). In adition, it assumes that the witness does not assert his Fifth Amendment privilege or otherwise refuse to testify. Cf. *Mayes* v. *Sowders*, 621 F.2d 850 (6th Cir.), cert. denied, 449 U.S. 922 (1980); *United States* v. *Fiore*, 443 F.2d 112 (2d Cir. 1971), cert. denied, 410 U.S. 984 (1983). Finally, it assumes that the witness is able to understand the proceedings. Obviously, producing a witness who is physically or mentally impaired to the point that he cannot engage in a question and answer dialogue would be no different from failing to produce the witness at all.

nesses"); *Mattox* v. *United States*, 156 U.S. 237, 242 (1895) (purpose of Confrontation Clause is to prevent use of depositions or *ex parte* affidavits in lieu of cross-examination).

In any event, this is not a case in which the witness recalls virtually nothing of relevance regarding his prior statement or the underlying events. Foster, who testified at great length on both direct and cross-examination (2 Tr. 71-131), specifically recalled, inter alia: (i) various details leading up to the assault; (ii) how he was struck on the head with a metal object; (iii) the precise injuries he suffered from the assault; and (iv) how he jammed his finger into his assailant's chest (see 2 Tr. 81-96, 100). Most importantly, he recalled vividly his hospital visit by Mansfield in which he identified respondent as his assailant, and he recalled telling Mansfield that he "jammed [his] finger into Owens' chest" (2 Tr. 96-97).

In those areas where Foster had in fact suffered a memory loss, defense counsel brought out the failure of his recollection in painstaking detail. And the defense was given wide latitude to impeach Foster with various inconsistent statements he had purportedly made to hospital personnel, as well as the remark he had made to Agent Mansfield in which he mentioned a name other than respondent's (2 Tr. 108-109, 113-114). The extensive and productive cross-examination enabled the defense to argue in summation that Foster's own testimony demonstrated that he had not seen his assailant but had made his pretrial identification based on what someone else had told him (7 Tr. 59-66). In short, the defense was able to "probe and expose" Foster's memory loss and to "call[] to the attention of the fact finder the reasons for giving scant weight to the witness' testmony." *Fensterer*, slip op. 6-7. The Confrontation Clause requires no more.[6]

[6] The court of appeals' finding of a Confrontation Clause violation because of a witness's memory loss is particularly disturbing in the

c. The Ninth Circuit's decision in this case, if permitted to stand, would have serious adverse implications for another, closely related, class of out-of-court statements: memoranda or records offered for admission under the past recollection recorded exception to the hearsay rule (Fed. R. Evid. 803(5)). Courts have consistently found no Confrontation Clause violation in the admission of statements satisfying that exception, even though the exception expressly requires that the witness have "insufficient recollection to enable him to testify fully and accurately * * *." See, *e.g.*, *United States* v. *Riley*, 657 F.2d 1377, 1385 n.13 (8th Cir. 1981), cert. denied, 459 U.S. 1111 (1983); *United States* v. *Marshall*, 532 F.2d 1279, 1285 n.4 (9th Cir. 1976); *United States* v. *Smalls*, 438 F.2d 711, 714

---

context of this case. As the evidence at trial demonstrated (2 Tr. 133-170), and as the defense concedes (Owens C.A. Br. 6 n.1), Foster's memory loss was *caused* by the assault itself. And the Ninth Circuit, in finding that the violation of Fed. R. Evid. 801(d)(1)(C) was harmless, essentially concluded that there was substantial independent evidence—wholly apart from Foster's pretrial identification of respondent—that respondent committed the assault (App., *infra*, 12a). Yet it is well established that "when confrontation becomes impossible due to the actions of the very person who would assert the right, logic dictates that the right has been waived." *United States* v. *Thevis*, 665 F.2d 616, 630 (5th Cir.), cert. denied, 456 U.S. 1008 (1982). Accord, *e.g.*, *Reynolds* v. *United States*, 98 U.S. 145, 158 (1878); *Steele* v. *Taylor*, 684 F.2d 1193, 1201-1203 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983); *Black* v. *Woods*, 651 F.2d 528, 531-532 (8th Cir.), cert. denied, 454 U.S. 847 (1981). In this case, putting aside Foster's pretrial identification, there is still a preponderance of evidence—or even clear and convincing evidence—linking respondent to the assault (see *Steele*, 684 F.2d at 1202 (applying preponderance standard); *Thevis*, 665 F.2d at 631 (applying clear and convincing standard)). Given the strong independent evidence demonstrating that respondent caused Foster's loss of memory, it would be "contrary to public policy, common sense, and the underlying purpose of the Confrontation Clause" to allow him to prevail on his Confrontation Clause claim. *United States* v. *Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977).

(2d Cir.), cert. denied, 403 U.S. 933 (1971); *United States* v. *Kelly*, 349 F.2d 720, 770 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966). If the Ninth Circuit is correct that the Confrontation Clause requires that a witness recall not only the making of the out-of-court statement, but also the facts contained within the statement, that exception to the hearsay rule could be subject to serious constitutional challenge. While the court of appeals did not purport to address statements falling within that or other similar exceptions to the hearsay rule, its Confrontation Clause analysis would appear, at minimum, to subject statements falling into those categories to a case-by-case analysis to determine the reliability of the statements in each instance (see App., *infra*, 18a-20a). Because the court's Confrontation Clause analysis has grave implications for the admissibility of any out-of-court statement in which the declarant has little or no present recollection of the facts asserted in the statement, review is warranted on this ground as well.

2. The court of appeals' decision also raises an important question under the Federal Rules of Evidence. In addition to determining that the introduction of Foster's identification of respondent violated the Confrontation Clause, the court also held (App., *infra*, 9a-11a) that the evidence was improperly admitted under Fed. R. Evid. 801(d)(1)(C). The court's ruling is contrary to both the language and purpose of Rule 801(d)(1)(C), and it is inconsistent with decisions of other courts of appeals construing that Rule under analogous circumstances. Moreover, since the provisions governing prior inconsistent statements (Rule 801(d)(1)(A)) and prior consistent statements (Rule 801(d)(1)(B)) use the same pertinent language, the effect of the court's decision is not limited simply to pretrial statements of identification.

a. Under Rule 801(d)(1)(C), a prior statement of identification is categorized as nonhearsay when "[t]he declarant testifies at the trial or hearing and is subject to cross examination *concerning the statement*" (emphasis added). That language is not even arguably ambiguous; there is no mention of any requirement that the witness be subject to cross-examination concerning the "subject matter" of the statement. A comparison with the language in Fed. R. Evid. 804(a) is particularly instructive. Rule 804(a), which adopts numerous exceptions to the hearsay rule based upon the declarant's "unavailability as a witness," defines "unavailability" to include situations in which the witness "testifies to a lack of memory *of the subject matter of his statement*" or "persists in refusing to testify *concerning the subject of his statement*." Fed. R. Evid. 804(a)(2) and (3) (emphasis added). As one commentator has observed, "[h]ad there been an intention in [Fed. R. Evid.] 801(d)(1) to require the witness to be cross-examinable concerning the matter asserted in his statement, Rule 804(a) demonstrates that the framers had the language to do it." 4 D. Louisell & C. Mueller, *Federal Evidence* § 421, at 213-214 n.64 (1980); see also *id.* § 419, at 179-180. Under the plain language of Rule 801(d)(1)(C), a witness's inability to recall the events to which a pretrial identification relates should not preclude the admission of evidence of that identification.[7]

[7] When a witness testifies to a memory loss concerning the prior statement itself, some courts have held that, if the memory loss is selective or apparently feigned, the prior statement may nonetheless be admitted under Rule 801(d)(1). See, *e.g.*, *DiCaro*, 772 F.2d at 1323-1325; *United States* v. *Baker*, 722 F.2d at 347-348 & n.8. Similarly, in enacting Rule 801(d)(1)(C), Congress contemplated that, when a witness makes a pretrial identification of the defendant and then, because of fear, refuses to acknowledge that identification in court, his prior statement should nonetheless be admissible through third parties. See *United States* v. *Elemy*, 656 F.2d 507, 508 (9th Cir. 1981)

The court of appeals' construction of Rule 801(d)(1)(C) is at odds not only with the plain language of the Rule but with its purpose as well. In 1975, shortly after the adoption of the Federal Rules of Evidence, Congress amended Rule 801(d)(1) by adding a new Subsection (C) to permit the introduction of prior out-of-court identifications. See 4 Louisell & Mueller, *supra*, § 410, at 46-47; H.R. Rep. 94-355, 94th Cong., 1st Sess. 2-3 (1975). In discussing the purpose of the proposed amendment, the House Report observed (*id.* at 3) that out-of-court identifications were "particularly important in jurisdictions where there may be a long delay between arrest or indictment and trial." It noted (*ibid.*) that "[a]s time goes by, a witness' memory will fade and his identification will become less reliable." The proposed Rule therefore was designed to "[make] sure that delays in the criminal justice system do not lead to cases falling through because the witness can no longer recall the identity of the person he saw commit the crime." *Ibid.*; accord S. Rep. 94-199, 94th Cong. 1st Sess. 2 (1975); 121 Cong. Rec. 31867 (1975); *United States* v. *Lewis*, 565 F.2d 1248, 1251 (2d Cir. 1977), cert. denied, 435 U.S. 973 (1978); *United States* v. *Marchand*, 564 F.2d 983, 996 (2d Cir. 1977), cert. denied, 434 U.S.1015 (1978); 4 Louisell & Mueller, *supra*, § 421, at 205. The court of appeals' decision totally undermines this legislative intent.

b. The court of appeals' reasoning is at odds with the construction of Rule 801(d)(1)(C) adopted by other circuits that have addressed the issue. In *United States* v. *Lewis*, *supra*, the Second Circuit held that, even though a witness could not make an in-court identification, her prior out-of-court identification was nonetheless admissible under the Rule. The court noted (565 F.2d at 1252) that the witness was able to recall her prior identification and

(citing 121 Cong. Rec. 31866-31867 (1975)). The present case does not raise either of those issues, however, since Foster had a full recollection of his statement to Mansfield.

to testify about the circumstances of that identification. The court then observed (*ibid.*) that "[i]t seems clear both from the text and the legislative history of the amended Rule that testimony concerning extra-judicial identifications is admissible regardless of whether there has been an accurate in-court identification." Accord *United States* v. *Ingram*, 600 F.2d 260, 261 & n.* (10th Cir. 1979) (although witnesses did not identify defendant at trial, prior identification held admissible under Rule 801(d)(1)(C) because the witnesses "were available at trial and were subjected to thorough cross-examination concerning their out-of-court identification statements"); cf. *United States* v. *O'Malley*, 796 F.2d 891, 899 (7th Cir. 1986) (although government witness at trial recanted prior identification of defendant and denied that he participated in crime, prior out-of-court identification held admissible under Rule 801(d)(1)(C), because witness "was subject to cross-examination concerning his earlier statement made before trial").

Under the interpretation of the Rule 801(d)(1)(C) consistently adopted by courts prior to this case, it is clear that the district court was correct in admitting Foster's pretrial identification of respondent. Although Foster suffered a partial memory loss with regard to the assault itself, his recollection of the pretrial identification was vivid. Since Foster was subject to unimpeded cross-examination "concerning [his] statement," the requirements of Rule 801(d)(1)(C) were satisfied.

c. The court of appeals' analysis has implications that extend well beyond the context of prior identifications. The requirement that the declarant be subject to cross-examination "concerning the statement" also applies to prior inconsistent statements (Rule 801(d)(1)(A)) and prior consistent statements (Rule 801(d)(1)(B)). Under the Ninth Circuit's rationale, the admission of those kinds of statements would likewise be improper unless the witness is

also subject to cross-examination on the "subject matter of the statement." Again, there is nothing in the language or purposes of Subsections (A) and (B) of Rule 801(d)(1) to support that interpretation. But unless the Ninth Circuit's analysis of the language of Rule 801(d)(1) is corrected, the court's decision in this case will cause confusion not only with respect to Rule 801(d)(1)(C), but also with respect to statements offered under the other two subdivisions of Rule 801(d)(1). For that reason as well, the Court should grant certiorari in this case to review the court of appeals' analysis of the federal evidentiary rule permitting the admission of prior statements by a witness.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROBERT H. KLONOFF
Assistant to the Solicitor General

JOHN F. DE PUE
Attorney

DECEMBER 1986

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-5015
D.C. No. 83-630-AWT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JAMES JOSEPH OWENS, DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima,
United States District Judge, Presiding

Argued and Submitted: November 9, 1984
Pasadena, California

[Filed May 12, 1986]

OPINION

Before: NELSON, BOOCHEVER, and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

I. BACKGROUND

James Joseph Owens appeals his conviction under 18 U.S.C. § 113(a) for assault with intent to commit murder.

On April 12, 1982, Correctional Officer John Foster was brutally assaulted while on duty at the federal prison at Lompoc, California. The evidence at trial established

that Foster's attacker beat him repeatedly with a metal pipe. Foster sustained numerous injuries to his face, arms and hands as well as to his head. His injuries resulted in a profound loss of memory with respect to several events, including the attack itself.

On May 5, 1982, shortly before Foster left the hospital, he was questioned by FBI Agent Thomas G. Mansfield. Mansfield asked Foster who had assaulted him. Foster replied that it had been Owens, who was—and continues to be—a Lompoc inmate. Mansfield then displayed several photographs, including one of Owens, and Foster identified Owens' picture.

At trial, Foster testified that he had little memory of the attack. He testified that he could only remember feeling an impact on his head and seeing blood on the floor, and that he had no memory of seeing his assailant. While the record indicates that Foster was visited in the hospital by many people, including his wife who visited daily, his only clear memory of any visit concerned the May 5th visit by Mansfield. Foster recounted Mansfield's question as to who had attacked him and Mansfield's request that he make the photospread identification, as well as his responses to Mansfield.

On cross-examination, Foster reaffirmed his inability to recount the details of the attack. When asked if he remembered making any statements during his hospitalization, Foster testified that the only statements he remembered making were the statements of identification made to Mansfield. Defense counsel sought to refresh Foster's recollection with certain hospital records indicating that while he was hospitalized Foster had alternately disclaimed knowledge of his attacker and attributed the assault to someone other than Owens. However, Foster was still unable to remember making any statements other than the ones to Mansfield. Similarly, Foster was unable to remember any visitors other than

Mansfield, nor could he remember whether any of these visitors had suggested that Owens had been his assailant. Finally, Foster reaffirmed that he could "vivid[ly]" recall his statement to Mansfield and that at the time he made the statement, he knew why he had identified Owens. However, he was unable to remember any fact or reason that had caused him to state that Owens was the assailant.

On appeal, appellant's principal challenge is to the district court's admission of Foster's out-of-court identifications of Owens, which he contends was erroneous on four separate grounds.[1] First, Owens contends that since Foster had no recollection of his attacker, he lacked the personal knowledge required under Fed. R. Evid. 602 to testify to the identification. Second, Owens contends that Foster's initial statement implicating Owens was not an identification of someone "made after perceiving him" within the meaning of Fed. R. Evid. 801(d)(1)(C), and was therefore improperly admitted. Third, appellant argues that Foster's memory loss was such that he was not subject to cross-examination and therefore his testimony was inadmissible under Rule 801(d)(1)(C). Fourth, and related to his third contention, Owens argues that Foster's near-complete memory loss resulted in a deprivation of Owens' right to effective cross-examination in violation of the Sixth Amendment. Appellant would prevail under his challenge based on the Federal Rules of Evidence—the first three claims—if Foster's testimony were held to be inadmissible under either Rule 602 or Rule 801(d)(1)(C).

---

[1] Appellant also challenges the district court's denial of his pretrial motion to substitute counsel. Because we reverse appellant's conviction on other grounds, we do not reach that issue.

II. THE CLAIMS UNDER THE FEDERAL RULES OF EVIDENCE

A. *Standard of Review*

The district court's construction of the Federal Rules of Evidence is a question of law subject to *de novo* review. *United States v. McClintock*, 748 F.2d 1278, 1287 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 75 (1985). Questions of the admissibility of evidence which involve factual determinations, rather than questions of law, are reviewed for an abuse of discretion. *Id.* at 1291. When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters predominate. If an "essentially factual" inquiry is present, or if the exercise of the district court's discretion is determinative, then we give deference to the decision of the district court; otherwise, we conduct a *de novo* review. *See United States v. McConney*, 728 F.2d 1195, 1202-04 (9th Cir.) (en banc), *cert. denied,* 105 S. Ct. 101 (1984).

B. *Rule 602: "Personal Knowledge"*

In relevant part, Fed. R. Evid. 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." Appellant contends that because Foster was incapable of remembering whether or not he saw his attacker he lacked the requisite personal knowledge to testify to the out-of-court identifications of Owens.

Before an out-of-court identification can satisfy the provisions of Rule 602, the personal knowledge requirement must be applied twice. First, the witness, who testifies in the courtroom that a statement of identification was made out of court, must have personal knowledge as to the making of the out-of-court statement; he need not, however, have personal knowledge as to the events that

were the subject of his statement. *See* Advisory Committee Note to Rule 602; 3 D. Louisell & C. Mueller, *Federal Evidence* § 260 at 40 (1979); 3 J. Weinstein & M. Berger, *Evidence* ¶ 602[01] (1985); S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 305 (3d ed. 1982). Second, the declarant who made the out-of-court statement must have had personal knowledge of the events that were the subject of his statement. 4 D. Louisell & C. Mueller, *Federal Evidence* § 415 at 95-96 (1980); *McCormick on Evidence* §§ 10, 18, 300 (3d ed. 1984); Advisory Committee Note to Rule 803; 2 J.H. Wigmore, *Evidence* § 670 (Chadbourn rev. ed. 1979); *United States v. Lang*, 589 F.2d 92, 98 (2d Cir. 1978). In this case, unlike the normal situation, Foster is both the in-court witness and the out-of-court declarant.

Clearly, when Foster testified in court he had personal knowledge of the making of his statement of identification to Mansfield on May 5. Thus, there is no problem with the first application of Rule 602. There is, however some difficulty with the second application. It is not at all clear that Foster ever had personal knowledge of the events that were the subject of his statements to Mansfield, that is, it is questionable whether Foster had personal knowledge of the identity of his assailant.[2]

A person has "personal knowledge" of "a fact which can be perceived by the senses" only if he "had an opportunity to observe, and [has] actually observed the fact." Advisory Committee Note to Rule 602. *Accord* 2 Wigmore, *supra,* § 650; *McCormick, supra,* § 10. Personal

---

[2] We note that if Foster did not have personal knowledge of the identity of his assailant, Mansfield's testimony regarding the identifications also is inadmissible because if we apply Rule 602 to Mansfield's evidence, the first application is satisfied, but the second is not, due to Foster's lack of knowledge.

knowledge of a fact cannot be based on the statement of another. 2 Wigmore, *supra,* § 657; *McCormick, supra,* § 10 at 25.[3]

Foster testified that he was walking down an aisle "when I felt an impact on my head . . . I looked down and saw blood on the floor and I—Now, I don't remember seeing at this time—I don't remember seeing the individual." Foster then said that "[t]he next thing I remember after receiving the blow to the head is many days later in the hospital." Finally, Foster stated that he could not recall "the person or persons" that struck him on the head. None of this testimony suggests that Foster saw his assailant. Indeed, it tends to suggest that he did not see his attacker and thus had no personal knowledge of the identity of his assailant. Moreover, Foster may have named Owens as a result of statements made to him during his hospital stay by one or more of his frequent visitors. Certainly the subject of the assault was one likely to arise when Foster and his friends or colleagues talked, and reports regarding the progress of the investigation may well have been conveyed to him. Unfortunately, as we have noted above, at the time of trial Foster had no recollection of any visits by persons other than Mansfield or the conversations that occurred during those visits.

The government argues in response that all of Foster's injuries were to the front of his body and therefore he must have seen his attacker. We agree that the location of the injuries provides support for the theory that Foster saw his attacker. On the other hand, it is possible that Foster was looking down or away and was taken by surprise when he was hit on the head; it is also possible that his assailant wore a mask or other disguise. Thus, the location of the injuries is not necessarily dispositive.

---

[3] There are certain exceptions to this rule, but none of them is relevant here. *See* 2 Wigmore, *supra,* §§ 664-670.

The question whether Foster had personal knowledge of the identity of his attacker is a mixed question of law and fact in which factual inquiries predominate, and thus, deference to the district court's ruling would normally be appropriate. Here, however, the district court did not rule on the issue after considering the evidence actually introduced.[4] Because the district court made its ruling without having the benefit of testimony, because the question is such a close one and turns heavily on a factual inquiry, and because of our disposition of other issues in this case, *see infra* p. [11a], we do not believe it necessary or advisable to determine whether Foster had personal knowledge of the identity of his attacker.

---

[4] Before the trial began, the district court ruled, based on an offer of proof by the government, that Foster met the personal knowledge requirement of Rule 602. Counsel for appellant were allowed at that time to enter a continuing objection to Foster's testimony. The testimony at trial did not correspond to the offer of proof, but the district court did not reconsider its ruling, despite the continuing objection. Because the testimony at trial was so different from the offer of proof, we simply cannot say that the district court in fact ruled that "evidence [was] introduced sufficient to support a finding that [the witness had] personal knowledge of the matter." Rule 602.

Our dissenting colleague argues that in order to avoid deciding the constitutional question we should remand the case to the district court so that it can determine whether or not Foster had the requisite personal knowledge. While we have serious questions regarding whether or when the generally salutory jurisprudential principle invoked by Judge Boochever should be applied where the result would be to remand a criminal case for further proceedings, we need not address that issue here. As we hold *infra*, p. [12a], the admission of Foster's testimony was in any event harmless error under the non-constitutional standard that is applicable to a violation of the Federal Rules of Evidence. Thus, even if the district court were to decide that Foster did not have the necessary personal knowledge, and thus that Rule 602 was violated, we would still have to reach the constitutional question.

C. *Rule 801(d)(1)(C)*

1. "Made after perceiving him."

During trial, Foster testified that prior to the photospread, Mansfield asked him whether he knew who his assailant was and that he responded that it was Owens. Appellant argues that the part of Foster's testimony relating his response constituted impermissible hearsay.

Rule 801(d)(1)(C) provides that

> [a] statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving him.

Appellant contends that Foster's initial statement to Mansfield was not an "identification of a person made after perceiving him," on the ground that the perception the rule refers to is a perception occurring after the crime has taken place. This question as to the meaning of Rule 801(d)(1)(C) is, as noted in part II.A, *supra*, reviewed *de novo*.

Foster's statement to Mansfield clearly complied with the literal wording of Rule 801(d)(1)(C): he had perceived appellant many times prior to the identification he gave to Mansfield. Furthermore, the purpose of 801(d)(1)(C) is to allow the introduction of identifications made when the "the witness' observations are still fresh in his mind . . . before his recollection has been dimmed by the passage of time . . . [or there has been] the opportunity . . . to influence the witness to change his mind." S. Rep. No. 199, 94th Cong., 1st Sess. 2 (1975). *See also* H.R. Rep. No. 355, 94th Cong., 1st Sess. 3 (1975), *reprinted in* 1975 U.S. Code Cong. & Ad. News 1092, 1094 (same). A requirement that Foster first view appellant before being asked whether he knew who his assailant was would not further this purpose; rather, it would seem to hinder it by

making Foster's subsequent identification a product of governmental suggestion. The commentators have rejected any requirement that the identifying witness perceive the person again after the crime, and we do also. *See* 4 Louisell & Mueller, *supra*, § 421 at 207-08; 4 Weinstein & Berger, *supra*, ¶ 801(d)(1)(C)[01] at 801-175.[5]

2. "Subject to cross-examination"

Appellant next argues that Foster's statements identifying him as the assailant constitute impermissible hearsay because Foster was not, in view of his loss of memory at the time of trial, "subject to cross-examination" within the meaning of Rule 801(d)(1)(C). This mixed question of law and fact is not predominantly factual, so we review it *de novo*. We assume, *arguendo*, that Foster was subject to cross-examination as to his acts of (a) making the statement in which he named appellant as his assailant and (b) selecting Owens' picture from the photospread. The question before us, however, is whether Rule 801(d)(1)C) contemplates cross-examination of the declarant on the facts and circumstances *underlying* the identification and, if so, whether Foster's loss of memory prevented compliance with that requirement.

An examination of Rule 801(d)(1)(C) and its rationale compels the conclusion that an extra-judicial identification may not be admitted unless the declarant is subject to cross-examination on the reasons why he made the identification. Hearsay evidence is excluded because it is thought to be generally substantially less reliable than live

---

[5] Appellant's contention is based on a rather cryptic statement in M.H. Graham, *Handbook of Federal Evidence* § 801.13 n.96 (1981 & Supp. 1985). It is not clear that the footnote asserts what appellant claims it does, but even if we assume that appellant's reading of the footnote is correct, the assertion is not supported by the authority the footnote cites: *United States* v. *Marchand*, 564 F.2d 983 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978). Rather, *Marchand* appears to support the view we adopt.

testimony. 4 Lousisell & Mueller, *supra,* § 413 at 69; 4 Weinstein & Berger, *supra,* ¶ 800[01] at 800-11. Live testimony is considered reliable because it is given under oath, the jurors can observe the witness' demeanor, and the witness is subject to cross-examination. 4 Louisell & Mueller, *supra,* § 413 at 71-72; 4 Weinstein & Berger, *supra,* ¶ 800[01] at 800-10 to 800-11; McCormick, *supra,* § 245. Of these safeguards, cross-examination is thought to be the most important. McCormick, *supra,* § 245 at 728; 4 Louisell & Mueller, *supra,* § 413 at 72.

It is the power of cross-examination that provides the principal rationale for Rule 801(d)(1). The reliability concerns of the rule against hearsay have been satisfied when "the witness is . . . subject to cross-examination . . . There is ample opportunity to test him as to *the basis* for his former statement." *United States v. Fiore,* 443 F.2d 112, 115 (2d Cir.), *cert. denied,* 410 U.S. 984 (1972) (quoting 3 J.H. Wigmore, *Evidence* § 1018 (3d ed. 1940)) (emphasis added); *Accord* McCormick, *supra,* § 251 at 745; 4 Weinstein & Berger, *supra,* ¶ 801(d)(1)[01] at 801-97 & n.4.

The cross-examination requirement of Rule 801(d)(1)(C) is intended to permit the opposing party to explore the trustworthiness of the extra-judicial statement of identification. Although cross-examination on the process of identification itself is consistent with this objective, it does not, without more, satisfy it. In order to explore adequately the trustworthiness of the prior identification, and thereby satisfy the purpose of the Rule, the opposing party must be permitted to cross-examine the declarant on the facts and circumstances underlying the identification. Accordingly, the scope of cross-examination contemplated by Rule 801(d)(1)(C) extends beyond the mere incident of identification and includes the basis on which the declarant made the out-of-court identification.

Having determined the proper scope of cross-examination under Rule 801(d)(1)(C), we must next determine whether Foster was "subject to cross-examination," within the meaning of the Rule, on the basis for his identification of Owens. Appellant's counsel were not restricted in their questioning of Foster on this issue, but Foster's unvarying answer was that he did not remember. The question then is whether an inability to answer due to a loss of memory means that the witness is not "subject to cross-examination." We conclude that for the reasons discussed in part III, *infra,* Foster's inability to answer questions on cross-examination prevented appellant from adequately exploring the basis for Foster's out-of-court identifications and that the jury did not have sufficient grounds for evaluating the correctness of those identifications. We therefore hold that Foster was not "subject to cross-examination" within the meaning of Rule 801(d)(1)(C) and that Foster's testimony as to his out-of-court identifications constituted inadmissible hearsay.[6]

3. *Harmless error*

In order to decide whether the erroneous admission of Foster's testimony requires the reversal of appellant's conviction we must determine "whether the prejudice resulting from the error was more probably than not harmless." *United States v. Barrett,* 703 F.2d 1076, 1081-82 (9th Cir.

---

[6] We note that a similar issue exists with respect to the testimony of Mansfield. Under Rule 801(d)(1)(C), one to whom a witness makes an identification may testify to the fact of the identification as long as the person who actually made the identification is subject to cross-examination with respect to that identification. *See United States v. Elemy,* 656 F.2d 507, 508 (9th Cir. 1981). Since we conclude that, as a result of his memory loss, Foster was not subject to cross-examination, it would appear that Mansfield's statement should have been excluded also. However, we need not decide that issue here.

1983); *United States v. Castillo*, 615 F.2d 878, 883-84 (9th Cir. 1980); *United States v. Valle-Valdez*, 554 F.2d 911, 916 (9th Cir. 1977); Fed. R. Evid. 103(a).

In addition to Foster's testimony, the jury heard the testimony of four inmates who had either witnessed the attack, or to whom Owens had made inculpatory remarks regarding the assault. Two items of clothing identified as belonging to Owens, but with blood stains that corresponded to Foster's blood type, were found outside a prison window. We recognize that there are reasons why the jury might not have found the testimony of the inmates credible, *see infra* part III. B, but the weight of the evidence is such that we conclude that it is more probable than not that the prejudice resulting from the erroneous admission of Foster's testimony was harmless. Thus, we must now turn to appellant's claim under the Confrontation Clause.

III. THE CONFRONTATION CLAUSE

A. *Jury's Ability to Evaluate Foster's Testimony*

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Appellant contends that because of Foster's complete inability to recall the facts and circumstances underlying his out-of-court identifications, appellant was prevented from engaging in effective cross-examination, and thus his rights under the Confrontation Clause were violated. The question raised by appellant was identified, but explicitly left open, by the Supreme Court in *California v. Green*, 399 U.S. 149, 168-70 (1970), and *Delaware v. Fensterer*, 106 S. Ct. 292, 295 (1985) (per curiam).[7] Because appellant's claim involves a mixed ques-

[7] In *Fensterer*, the Supreme Court summarily held that the Confrontation Clause was not violated by the admission of the *in-court* testimony of an expert witness who could not remember the basis for

tion of law and fact, and is not predominantly factual, and because it "requires consideration of the abstract legal principles that inform constitutional jurisprudence," we review it *de novo*. *McConney*, 728 F.2d at 1203.

The Supreme Court has stated that "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact has a satisfactory basis for evaluating the truth of the [out-of-court] statement.' " *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (plurality opinion) (quoting *Green*, 399 U.S. at 161). This mission is accomplished in three ways: first, by insuring that the declarant testifies under oath; second, by forcing the declarant to submit to cross-examination, "the greatest legal engine ever invented for the discovery of truth;" and third, by permitting the jury to observe the declarant's

one of the conclusions he testified to while in court. The case before us, however, involves the admission of an *out-of-court* statement. The Court explicitly stated in *Fensterer* that it was expressing no opinion as to the admissibility of *out-of-court* statements by witnesses who, as of the time of trial, had lost their memory. 106 S. Ct. at 295-96. Moreover, there is a distinct possibility that Foster's memory regarding the attack was impaired even prior to the time of his identification of Owens; obviously, the expert witness' memory loss in *Fensterer* did not occur before the time he reached his conclusions.

The dissent appears to take the position that because Foster testified and defense counsel were able to ask him questions, this case does not present the question left open in *Green* and *Fensterer*. Such a position is based on a misunderstanding of the Supreme Court's language in these cases. In *Green*, the forgetful witness had in fact testified and been cross-examined, but the Court noted that it still might be possible that the witness' "apparent lapse of memory so affected [the defendant's] right to cross-examine as to" constitute a violation of the Confrontation Clause. 399 U.S. at 168. The case before us involves the introduction of a prior out-of-court statement that was not subjected when it was made to cross-examination or the other safeguards of testimony at trial, and accordingly the question left open by *Green* and *Fensterer* is presented here. *See Fensterer*, 106 S. Ct. at 295.

demeanor. *Green,* 399 U.S. at 158. Clearly, Foster testified under oath; clearly the jury was able to observe his demeanor. The question, therefore, is whether in view of Foster's memory loss, it was possible for Owens to cross-examine him effectively.

The Supreme Court has repeatedly emphasized the importance of cross-examination in furthering the goals of the Confrontation Clause. *See, e.g., Ohio v. Roberts,* 448 U.S. 56, 63 & n.6 (1980) (quoting *Douglas v. Alabama,* 380 U.S. 415, 418 (1965)). Statements about which the declarant has not been cross-examined are generally thought to be subject to three dangers. First, misperception: the declarant may not have accurately perceived what he describes, or he may not have perceived it at all. Second, failure of memory: at the time the declarant makes his statement his memory may not correspond completely and accurately with his earlier perceptions. Third, faulty narration: the declarant, in his statement, may fail, either deliberately or inadvertently, to convey what he remembers accurately. McCormick, *supra,* § 245; 4 Louisell & Mueller, *supra,* § 413; 4 Weinstein & Berger, *supra,* ¶ 800[01]; Advisory Committee Note to Fed. R. Evid. Article VIII: "Introductory Note—The Hearsay Problem."[8] Normally, cross-examination will eliminate or significantly reduce these dangers. A careful inquiry by opposing counsel will help to expose any misperception or failure of memory. It may serve to impeach the declarant or it may refresh his recollection and cause him to alter his testimony to make it more accurate. Similarly, close questioning will usually force the declarant to explain clearly what he meant, and will make it harder for a lying declarant to maintain a consistent story, thus reducing the

[8] Some commentators find four risks by subdividing faulty narration into two parts: ambiguity (inadvertent faulty narration) and insincerity (deliberate faulty narration). *See, e.g.,* 4 Louisell & Mueller, *supra,* § 413.

danger of failure of narration. 4 Louisell & Mueller, *supra,* § 413; 4 Weinstein & Berger, *supra,* ¶ 800[01] at 800-11; Advisory Committee Note to Fed. R. Evid. Article VIII: "Introductory Note—The Hearsay Problem."

In this case, however, the type and extent of cross-examination to which Foster could be subjected could not serve to expose or significantly affect two of the three dangers surrounding an out-of-court identification, namely misperception and failure of memory. The only answers Foster was capable of giving could not provide the jury with the information it needed in order to determine whether Foster had perceived his attacker, accurately or at all, or whether at the time he made the identification, his memory correctly reflected his perceptions.

At the time of trial Foster did not remember who attacked him or whether he had actually seen his attacker. Foster recalled that when he met with Mansfield he had a reason for identifying appellant, but stated that he could no longer remember what that reason was. Indeed, Foster apparently remembered almost nothing about the period of time commencing with the assault on him and ending with the out-of-court statements he made to Mansfield.[9]

[9] Our dissenting colleague argues that there is a dispute as to the nature and extent of Foster's memory loss because Foster remembered and testified to certain events occurring during his hospitalization. This argument misses the point, however. We are not concerned with what Foster remembers about his stay in the hospital. Rather, what is relevant for purposes of the Confrontation Clause is Foster's memory of the events surrounding the assault. There is no dispute that Foster's loss of memory as to these events is actual and complete.

Futhermore, the dissent attempts to support its argument with a hypothetical example involving out-of-court exculpatory statements made by Foster as a *defense* witness. The fact that a statement by a prosecution witness is inadmissible does not necessarily lead to the conclusion that similar statements by a defense witness are inadmissible, *see, Chambers v. Mississippi,* 410 U.S. 284 (1973); accordingly, the dissent's hypothetical example is not particularly helpful in resolving the case before us.

No one, including Foster, knows whether (1) Foster actually perceived his assailant, (2) if so, whether his perception of his attacker was accurate, and (3) whether at the time of his out-of-court identifications he had any memory of having observed that assailant. Not even the most skilled cross-examiner could elicit information that would help reduce the dangers of misperception or failure of memory. Clearly, two of the three dangers surrounding Foster's out-of-court identifications—misperception and failure of memory—could not be mitigated in any way by the only cross-examination of Foster that was available to Owens. Thus, Foster was not, and could not be, subjected to effective cross-examination concerning his out-of-court identifications. 4 Louisell & Mueller, *supra,* § 422 at 230, 248; 4 Weinstein & Berger, *supra,* ¶ 801(d)(1)(C)[01] at 801-178; Falknor, *The Hearsay Rule and Its Exceptions,* 2 U.C.L.A. L. Rev. 43, 53 (1954). Under the circumstances, cross-examination could not provide the jury with the requisite basis "for evaluating the truth of the [out-of-court] statement[s]." *See Green,* 399 U.S. at 161.[10]

---

[10] This case is readily distinguishable from the cases in which the courts have held that because the witness' claimed memory loss was so incredible as to not be believable a witness who had a claimed partial memory loss was "subject to cross-examination" within the meaning of Rule 801(d)(1) and the Confrontation Clause. *See, e.g., United States v. Williams,* 737 F.2d 594 (7th Cir. 1984), *cert. denied,* 105 S. Ct. 1354 (1985); *United States v. Baker,* 722 F.2d 343 (7th Cir. 1983), *cert. denied,* 465 U.S. 1037 (1984); *United States v. Russell,* 712 F.2d 1256 (8th Cir. 1983); *United States v. Thompson,* 708 F.2d 1294 (8th Cir. 1983); *United States v. Murphy,* 696 F.2d 282 (4th Cir. 1982), *cert. denied,* 461 U.S. 945 (1983); *Vogel v. Percy,* 691 F.2d 843 (7th Cir. 1982); *United States v. Distler,* 671 F.2d 954 (6th Cir.), *cert. denied,* 454 U.S. 827 (1981); *United States v. Rogers,* 549 F.2d 490 (8th Cir. 1976), *cert. denied,* 431 U.S. 918 (1977); *United States v. Shoup,* 548 F.2d 636 (6th Cir. 1977). *See also People v. Green,* 3 Cal. 3d 981, 92 Cal. Rptr. 494, 479 P.2d 998 (1971) (applying Cal. Evid. Code § 1235, which is very similar to Fed. R. Evid. 801(d)(1)(A)). The rationale in these cases was that the witness' untruths or evasions regarding their ability to remember gave rise to inferences concerning the truth of their prior out-of-court statements, and thus the jury had a basis for evaluation that satisfied Rule 801(d)(1) and the Confrontation Clause. In the case before us, however, there is no question but that Foster's memory loss is actual and complete.

Furthermore, all but one of the cases cited dealt with Rule 801(d)(1)(A), which states that prior inconsistent statements under oath are not hearsay. Thus, these courts were really wrestling with the question of whether a loss of memory is inconsistent with a prior remembrance. Appellant, however, has invoked Rule 801(d)(1)(C), not 801(d)(1)(A). *Baker,* the sole exception, did involve Rule 801(d)(1)(C), but the court held that the Rule 801(d)(1)(A) cases were controlling, without any discussion of the differences between the two provisions.

Finally, in all but one of the cases cited in this note, the witnesses who suffered the "incredible" memory loss were criminal associates of the defendants. The witnesses' prior out-of-court statements inculpated the defendants, and presumably the memory loss was faked in an attempt to avoid inculpating them further. On appeal, the defendants further tried to improve their legal position by arguing that the witnesses' courtroom loss of memory meant that the prior out-of-court inculpatory statements were inadmissible. In *Distler,* the sole case in which the forgetful witnesses were not criminal associates of the defendant, the court noted the close personal friendship between the defendant and the witnesses' employer. Obviously, in the case before us, Foster's loss of memory, which was actual, not simulated, did not constitute part of an attempt to make it more difficult to convict the defendant.

The government contends, and our dissenting colleague agrees, that Foster was subject to "full and effective" cross-examination because he could be cross-examined on the subject of the meeting with Mansfield during which he made the identifications of Owens. This argument appears to be based on *United States ex rel. Thomas v. Cuyler,* 548 F.2d 460, 463 (3d Cir. 1977), in which the court held that the Confrontation Clause is satisfied if the witness is sworn and does not refuse to answer questions, regardless of the witness' actual or feigned loss of memory. The Third Circuit based its holding on Justice Harlan's

separate concurring opinion in *Green,* 399 U.S. at 172-189. Justice Harlan, however, less than a year later, repudiated the approach he took in his separate opinion in *Green, see Dutton,* 400 U.S. at 93-100 (Harlan, J., concurring), and the Supreme Court has rejected it as well. *Roberts,* 448 U.S. at 66 n. 9. Accordingly, we must reject the government's argument.

Because the jury could not evaluate the truth, or in this case the correctness, of Foster's remarks, appellant's rights under the Confrontation Clause have been violated, *Green,* 399 U.S. at 159-61,[11] unless a "showing of particularized guarantees of trustworthiness" of Foster's out-of-court identifications was made. *Roberts,* 448 U.S. at 66.[12]

---

[11] As we have discussed, *supra* note 10, the jury has a sufficient basis for determining the truth of a witness' testimony if the nature of the witness' claimed loss of memory is such that the jury can draw inferences regarding the truthfulness and believability of the witness from the claim itself. The cases described in note 10 all involved highly dubious claims of memory loss that permitted the jury to evaluate the reliability of both the witness' out-of-court statement and his in-court claim of memory loss. In *Fensterer,* the Supreme Court held that an expert witness' *actual* loss of memory as to how he reached certain conclusions permitted the jury to draw inferences regarding the reliability of the expert's conclusions, expecially when another expert testified and cast doubt on those conclusions. An expert who cannot remember why he arrived at his opinion is obviously not a very reliable expert, and once counsel has brought this fact out on cross-examination, the purposes of the Confrontation Clause have been served. In the case before us, however, Foster's memory loss results entirely from a brutal assault, and thus the mere fact that he has very little memory raises no inferences of any sort regarding the believability of his out-of-court statements. No questions posed to Foster by the defense could in any way assist the jury in its effort to determine whether his identifications of Owens were correct.

[12] Normally the second exception applies when cross-examination is not possible because the declarant cannot be produced at trial. The government has the burden of proving the declarant's unavailability. *Roberts,* 448 U.S. at 65-66.

In determing whether there has been a "showing of particularized guarantees of trustworthiness" of an out-of-court statement, we must examine the four so-called "indicia of reliability" which were set forth by the Supreme Court in *Dutton*. An out-of-court declaration is reliable if (1) the out-of-court statement does not contain an express assertion about past fact, (2) the possibility that the out-of-court statement is founded on a faulty recollection is extremely remote, (3) the circumstances under which the statement was made are such that it can be supposed that the declarant is not misrepresenting the facts, and (4) the declarant had personal knowledge of the matters asserted in the statement. 400 U.S. at 88-89 (plurality opinion). *See also Roberts,* 448 U.S. at 65-66 (same). If the out-of-court statement "falls within a firmly-rooted hearsay exception" then reliability and trustworthiness are presumed. *Roberts,* 448 U.S. at 66. In the case before us, however, none of the relevant hearsay exceptions applies. *See supra,* part II.B.

Turning to the *Dutton* indicia, we see that at least three of the four are not present here. First, Foster's out-of-court identifications contained express assertions of past fact. Second, we cannot say that the possibility is extremely remote that the out-of-court statements were founded on a faulty (or even total lack of) recollection at the time those statements were made. Third, we have no idea whether Foster's statements were based on information provided by others and whether he may therefore have unintentionally misrepresented the facts. As to the fourth indicium, it is unclear whether Foster had personal knowledge of the matters asserted in his identification of appellant. *See supra,* part II.C.

We have sometimes looked to other factors beside the *Dutton* indicia in determining whether an out-of-court statement is sufficiently trustworthy to be admitted without cross-examination. *See Barker v. Morris,* 761

F.2d 1396, 1403 (9th Cir. 1985). However, any such additional factors must give rise not only to a generalized belief in trustworthiness, but also to "particularized guarantees" of trustworthiness. *Roberts,* 448 U.S. at 66. In the case before us there are no circumstances which provide those "particularized guarantees." With respect to Foster's out-of-court identifications we know only that Foster made the identifications. Due to the fact that Foster had daily visitors while he was in the hospital, but does not remember any of them, there is a strong possibility that his identifications of Owens may have resulted from information provided by visitors rather than from his own perceptions at the time of the attack. In view of Foster's loss of memory we simply cannot determine on the basis of the record before us whether the out-of-court identifications are trustworthy.

Because Foster could not be subjected to cross-examination that would afford the jury a satisfactory basis for determining the truth of his out-of-court identifications, and because no "showing of particularized guarantees of trustworthiness" of the out-of-court statements was made, we conclude that appellant's rights under the Confrontation Clause were violated.[13]

---

[13] We also note that there may be problems under the Due Process Clause of the Fifth Amendment regarding the admission of Foster's testimony. The Supreme Court has indicated that when there is "a very substantial likelihood of irreparable misidentification," out-of-court identifications would violate the Due Process Clause. *Manson v. Brathwaite,* 432 U.S. 98, 116 (1977). Because of Foster's complete loss of memory, there may be such a likelihood in this case. However, in view of our resolution of appellant's Confrontation Clause claim, it is unnecessary for us to reach the Due Process Clause issue here.

B. *Harmlessness of Error*

Until recently, the law in our circuit regarding the effect of a Confrontation Clause violation was clear. In *Davis v. Alaska,* 415 U.S. 308, 318 (1974), the Court had said that if a defendant is "denied the right of effective cross-examination [there is] constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." We construed *Davis* as holding that the harmless error analysis of *Chapman v. California,* 386 U.S. 18 (1969), did not apply to violations of the Confrontation Clause. Rather, we said, as *Davis* appeared to say, that a violation of that clause necessarily mandated reversal. *See, e.g., Chipman v. Mercer,* 628 F.2d 528 (9th Cir. 1980); *Skinner v. Cardwell,* 564 F.2d 1381 (9th Cir. 1977), *cert. denied,* 435 U.S. 1009 (1978). However, in order to avoid automatic reversals divorced from any considerations of prejudice, our rule was that we would not find a violation of the Confrontation Clause unless the subject matter upon which a witness could not be properly cross-examined was sufficiently important. *See, e.g., Chipman; Cardwell.* Thus, while our rule differed from *Chapman* with respect to its analytical approach, the practical effect of the two rules was much the same.

The Supreme Court has now rejected our analytical approach and held that the *existence* of violations of the Confrontation Clause is to be determined without regard to considerations of prejudicial effect on the trial as a whole. It has also held, however, that *reversal* is required only under the circumstances that apply in the case of most other constitutional violations; specifically, it has now decided that the *Chapman* harmless error standard *is* applicable to violations of the Confrontation Clause. *Delaware v. Van Arsdall,* 106 S. Ct. 1431, 1438 (1986). Thus, we can no longer use the analysis applied in cases such as *Chapman* and *Skinner,* although our prior decisions may still be of precedential value.

The *Chapman* harmless error test is a strict one indeed. An error is harmless under *Chapman* only if the reviewing court can say it was "harmless beyond a reasonable doubt." *Van Arsdall,* 106 S. Ct. at 1438. In determining whether a violation of the Confrontation Clause meets the *Chapman* standard, we must consider, *inter alia,* " the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case." *Id.*

Although we have held above, *see* part II.C.3, that the erroneous admission of Foster's testimony was harmless error under the non-constitutional test, we must now consider whether it was harmless under the constitutional standard, because the two tests clearly utilize different standards. Under the non-constitutional test, an error is harmless if the prejudice resulting from the error was more probably than not harmless. *See supra* part II.C.3. However, under the strict constitutional test of *Chapman,* an error is harmless only if there is no "reasonable possibility that [it] might have contributed to the conviction." *Chapman,* 386 U.S. at 23.

Examining the relevant factors mentioned in *Van Arsdall*—and we recognize that different cases may require the examination of different factors—we conclude that the error here requires reversal. Foster's testimony was certainly important; in fact, it is difficult to think of any testimony more highly material than a victim's identification of his assailant, or more prejudical to a defendant's case. The fact that the jury was informed that Foster could not remember why he had identified Owens diminishes the impact of this testmony but does not change our basic view of its effect. The remaining testimony inculpating appellant was all given by witnesses

whose credibility the jury would have had every reason to question: prison inmates who had received lengthy prison terms for major felonies, who admitted having made prior statements under oath that were irreconcilable with their testimony at trial, who were quite likely aware that their parole dates might be advanced due to their cooperation with the government and whose testimony was internally inconsistent and inconsistent with each other's. Moreover, for the reasons we explained earlier, no meaningful cross-examination of Foster could be conducted with respect to the subject of his identification of the defendant. Finally, the prosecutor's case without Foster's testimony was not overwhelming. Having considered all of these facts and circumstances we cannot say that there is no reasonable possibility that Foster's testimony might have contributed to Owens' conviction. *Chapman,* 386 U.S. at 23. Accordingly, the error was not harmless beyond a reasonable doubt.

IV. CONCLUSION

Appellant's rights under the Confrontation Clause were violated, and the error was not harmless. We therefore reverse appellant's conviction and remand the case for a new trial.

REVERSED AND REMANDED.

BOOCHEVER, Circuit Judge, dissenting:

I must respectfully dissent because I believe the majority errs by (1) failing to remand to the district court for a factual determination whether Foster had personal knowledge of the identity of his attacker as required by Fed. R. Evid. 602, (2) holding that Foster was not "subject to cross-examination" within the meaning of Fed. R. Evid. 801(d)(1)(C), and (3) holding that Owens' right to confront Foster under the Sixth Amendment was violated.

A. Personal Knowledge

Fed. R. Evid. 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." (Emphasis added.) The majority concludes that the district court did not rule on the issue of Foster's personal knowledge of the identity of his assailant after the testimony at trial failed to correspond with the prosecution's offer of proof. The majority also states that it is not clear that Foster had personal knowledge of his attacker. I do not quarrel with these conclusions. The majority proceeds to dispose of the case on the Confrontation Clause issue, concluding, "we do not believe it necessary or advisable to determine whether Foster had personal knowledge of the identity of his attacker."

I would remand for a determination of the factual question of Foster's personal knowledge. If the district court finds that he did not have personal knowledge, we need not reach the constitutional issue.

If the district court on remand finds that Foster did not actually observe his attacker (of if the court is unable to make a determination), then the Rule 602 personal knowledge threshold forecloses use of his testimony. The conviction must then be reversed to permit a trial without allowing either Foster or the agent to testify as to Foster's

out-of-court identification. If the district court finds that Foster did actually observe his attacker, then the personal knowledge threshold is passed, and the evidentiary and constitutional issues properly may be reached for resolution. Because I also differ from the majority's disposition of those issues, I am obliged to address them.

B. "Subject to Cross-Examination" Under Rule 801(d)(1)(C)

Rule 801(d)(1)(C) provides that a statement is not hearsay if "[t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving him." Fed. R. Evid. 801(d)(1)(C) (emphasis added). Again it becomes clear that a finding of Foster's personal knowledge is critical to the proper determination of the propriety of his testimony. If it is found that Foster never perceived his attacker, then his testimony is inadmissible, and this determination needs no analysis into whether the rule requires effective cross-examination as to the basis underlying the identification.

Assuming arguendo that Foster did perceive his attacker, I cannot agree that he was not "subject to cross-examination" within the meaning of Rule 801. I have no objection to the majority's elucidation of Rule 801(d)(1)(C) and its rationale. I believe, however, that the requirements of the rule and its rationale were met in the cross-examination which occurred in this case. I disagree with the majority's conclusion that the extra-judicial identification may not be admitted unless the declarant is subject to cross-examination on the reasons, facts, and circumstances underlying the identification. The rule simply requires that the declarant be subject to cross-examination concerning the statement. It does not require that cross-examination of the declarant be sufficient to satisfy either the examining party or the reviewing court as to the basis

for the making of the identification. The Supreme Court's recent observation concerning the role of cross-examination in fulfilling the purpose of the Confrontation Clause is apposite to the concerns of Rule 801: "Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 106 S. Ct. 292, 295 (1985) (emphasis in original). All that Rule 801 requires is the opportunity for effective cross-examination concerning the out-of-court statement. I believe Owens had that opportunity.

Foster's testimony complied with the literal terms of the rule, for he was fully available for cross-examination as to his extra-judicial identification. He testified at trial, and was both subject to cross-examination and actually cross-examined as to the basis of his prior identification. Further, neither the policy nor the rationale underlying the rule was violated. The jury had "ample opportunity to test him as to the basis of his former statement." Cross-examination elicited that at the time of trial he could not remember seeing his attacker, could not remember anything up to the point of his identification of Owens in the hospital, could not remember anything after that identification, but could "vividly" recall his statement of identification. Further, cross-examination revealed that at the time he made the statement, he knew why he had identified Owens, though he could no longer remember the reason. Thus, contrary to the majority's statement that there is no question but that Foster's memory loss was actual and complete, Foster was able to testify and be cross-examined as to what he did remember. In the face of his selective memory, I believe the jury had an adequate basis to weigh the credibility of Foster's testimony. I also observe that whether his memory loss was actual and complete is properly a question for the jury.[1]

The importance of allowing the jury to weigh this type of testimony may be illustrated by the following analogy. Assume an attack and subsequent loss of memory as in this case, but instead of an incriminating extra-judicial identification, the victim looked at the photo-spread and stated "Owens was not the assailant." Later at trial, the victim cannot remember why he made the statement, only that he remembers vividly having made the statement, and that he had a reason for doing so. Assuming further that the victim had personal knowledge, shouldn't the statement be admitted in Owens' defense? It seems to me to be admissible and, if so, I see no reasoned basis under Rule 801(d)(1)(C) for distinguishing incriminating out-of-court statements.

Because Rule 801 requires no more than the opportunity to cross-examine a declarant as to an out-of-court prior identification, and because Foster was fully subject to cross-examination within the meaning of the rule, his testimony was admissible under the rule.

---

[1] The cases cited by the majority for the proposition that the court is to determine the nature and extent of the witness' memory loss are not persuasive. I would agree that there may be a threshold at which a court could conclude that a witness has not been subject to cross-examination. In the cases cited by the majority, however, the court permitted the jury to hear the testimony and exercise its function in weighing the credibility of the testimony. *See, e.g., United States v. Baker*, 722 F.2d 343, 348-49 (7th Cir. 1983), *cert. denied*, 465 U.S. 1037 (1984); *Vogel v. Percy*, 691 F.2d 843, 846 (7th Cir. 1982); *United States v. Rogers*, 549 F.2d 490, 494-96 (8th Cir. 1976), *cert. denied*, 431 U.S. 918 (1977).

C. Confrontation Clause

It is only if Foster's testimony is determined not to be hearsay that the court properly reaches the Confrontation Clause issue. Again assuming arguendo that Foster had personal knowledge of his assailant, I disagree with the majority's holding that Foster was not subject to cross-examination sufficient to satisfy the requirements of the Sixth Amendment.

As a preliminary matter, I disagree with the majority's characterization of this case as presenting the question that was identified but left open by the Supreme Court in *California v. Green*, 399 U.S. 149, 168-70 (1970), and *Delaware v. Fensterer*, 106 S. Ct. 292, 295 (1985). That question concerns an out-of-court statement of identification made by a witness who has no memory whatsoever of either the event itself or the making of the extra-judicial identification. In *Fensterer*, the Court said

> We need not decide today the question raised but not resolved in *Green*. As *Green*'s framing of that question [whether there are circumstances in which a witness' lapse of memory may so frustrate any opportunity for cross-examination that admission of the witness' direct testimony violates the Confrontation Clause] indicates, the issue arises only where a "prior statement," *not itself subjected to cross-examination* and the other safeguards of testimony at trial, is admitted as substantive evidence.

106 S. Ct. at 295 (emphasis added). The unresolved question would be presented only if the statement had been introduced without Foster testifying or without his having any recollection of making the out-of-court statement. Here, as I have indicated, Foster was available for cross-examination and was actually cross-examined concerning his prior statement.

The majority errs by equating the requirement of forcing the declarant to submit to cross-examination, *Green*, 399 U.S. at 158-59, with the question of whether it was possible for Owens to cross-examine him effectively. " 'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.' " *Fensterer*, 106 S. Ct. at 294-95 (quoting *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974), quoting 5 J. Wigmore, *Evidence* § 1395 (3d ed. 1940)) (emphasis in original). "Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Fensterer*, 106 S. Ct. at 295 (emphasis in original). Foster answered all questions put to him; he stated what he could remember and what he could not remember. He was thus subjected to cross-examination as required by *Green*.

The majority finds that in this case, however, the type and extent of cross-examination to which Foster could be subjected could not serve to expose several of the dangers surrounding out-of-court identification—misperception and failure of memory. To the contrary, the cross-examination directly addressed these issues. The questioning elicited that Foster could not remember seeing his assailant, nor could he remember why he identified Owens in the hospital. This was an adequate basis for counsel to argue that Foster's selective memory is not credible, and to permit the jury to make its determination of the weight to accord his testimony.

I am unconvinced by the majority's attempt to distinguish *Fensterer*. If a jury can be permitted to draw inferences regarding the reliability of an expert witness in the face of that witness' actual loss of memory as to the basis of his opinion, why cannot a jury also draw inferences regarding Foster's reliability in the face of his selective memory?

I also am struck by the curious result of the majority's analysis. In a case like *Green,* involving a witness who professed a lack of memory which the court found to be incredible or unbelievable, the jury will be permitted to hear the former statement and exercise its function of measuring the witness' credibility. If the court finds the memory loss believable, as in this case, then it will not permit the jury to hear the testimony. It is the jury's function to determine whether Foster's memory loss is actual and complete. We should not preempt the jury from exercising its role.

The Supreme Court has found Confrontation Clause violations when a court has denied the right to cross-examination, *e.g., Pointer v. Texas,* 380 U.S. 400, 406 (1965), when a court has limited cross-examination of a principal witness on a material issue such as bias, *e.g., Davis v. Alaska,* 415 U.S. 308 (1974), and when cross-examination has been completely thwarted by a witness' refusal to answer any questions, *e.g., Douglas v. Alabama,* 380 U.S. 415 (1965). The Court has never found a denial of the right of confrontation when a witness responds concerning some relevant events but alleges a loss of memory as to others. In its *Fensterer* decision, the Court addressed an almost identical issue and found no violation. We should follow that teaching.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-5015
D.C. No. 83-630-AWT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JAMES JOSEPH OWENS, DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Central District of California

[Filed May 12, 1986]

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-5015
D.C. No. 83-630-AWT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JAMES JOSEPH OWENS, DEFENDANT-APPELLANT.

[Filed September 2, 1986]

ORDER

Before: NELSON, BOOCHEVER and REINHARDT, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing and unanimously voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40055

OPPOSITION

BRIEF

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, Petitioner	)	No. 86 877
v.	)	
JAMES JOSEPH OWENS Respondent	)	RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Dated: January 7, 1987

Attorneys for Respondent

Allan Ides *
Loyola Law School
1441 West Olympic Blvd.
Los Angeles, CA 90015-1980
(213) 736-1001

Stanley A. Goldman
Loyola Law School

* Appointed under the Criminal Justice Act on March 29, 1984 by the Ninth Circuit Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Rules of Evidence

Treatise

QUESTION PRESENTED

The question presented is fact specific: Whether the Court of Appeals properly concluded that an out-of-court identification made by an assault victim with a memory lapse was, under the facts and circumstances presented, unreliable and, therefore, inadmissible under the Confrontation Clause of the Sixth Amendment. In so holding, the Court of Appeals fashioned no novel principles of law. Rather it applied straightforward standards endorsed by this Court in Ohio v. Roberts, 448 U.S. 56 (1980) and Dutton v. Evans, 400 U.S. 74 (1970). The sole question, therefore, is whether, in applying those standards, the Court of Appeals arrived at the correct conclusion.

STATEMENT

1. Introduction.

At issue is the admissibility of an assault victim's out-of-court identification of his assailant. The Court of Appeals held that the out-of-court identification was inadmissible because, under the facts and circumstances presented, the identification was untrustworthy and unreliable. Government's Appendix (Gov.App.) at 14a-20a.[1] The government now petitions this Court to review the judgment of the Court of Appeals, not because the Court of Appeals applied the wrong principles of law, but because the Court of Appeals achieved a result with which the government disagrees.

To this end the government colors its Petition for a Writ of Certiorari with a carefully sanitized version of the other evidence introduced at trial. Of course, the only facts relevant to the government's Petition are those involving the assault victim's recollection of the assault and his subsequent out-of-court identification of defendant. The focus on the other evidence is designed to suggest a great injustice has been done by the reversal. This Court's intervention is apparently required to achieve the correct result--regardless of the actual legal issues presented. Indeed, boiled down to its essentials, the government's dispute with the Court of Appeals' decision is with the result, not with reasoning or legal principles that led to that result.

In any event, the government's treatment of the other evidence is quite misleading. That evidence consists largely of

---

[1] All references to the Court of Appeals decision will be to the corresponding pages in the Appendix to the government's Petition for a Writ of Certiorari.

testimony by four inmates, three of whom claimed to have been eyewitnesses to the assault. The testimony of these witnesses was literally incredible. Not only did the witnesses contradict one another regarding major details of the assault, each of the witnesses' testimony was fraught with internal inconsistencies and illogic. Each had made prior inconsistent statements. One of the inmates offered eight different versions of the assault. The only thread that held the multifarious descriptions together was the out-of-court statement by the victim of the assault identifying defendant as his assailant.[2] Importantly, none of the inmates testified that the victim had an opportunity to observe or to in any manner identify his assailant.

As such, this other evidence has no bearing on the reliability of the out-of-court identification--the only issue legitimately presented by the government's Petition for a Writ of Certiorari. To the extent this Court is curious, however, a detailed description of the inmate testimony is found in the appellate record at pages 23-33 of Appellant's Opening Brief on Appeal. The focus of this Court's consideration, however, should be upon those facts pertinent to the admissibility of the victim's out-of-court identification and not upon the government's misguided effort to create an emotionally attractive certworthy case.

---

2 Notwithstanding its sanitized portrayal of the evidence in the text of its Petition, the government appears to concede the insufficiency of the other evidence in a subsequent footnote that describes that evidence as only "clear and convincing," i.e., not beyond a reasonable doubt. Petition for a Writ of Certiorari (Petition) at 17 n.6.

The government does suggest a conflict between the decision below and decisions in other circuits. However, this theoretical conflict exists, if at all, only because of the government's overly generalized approach to both this case and the supposedly conflicting decisions. Indeed, the government's notion of what constitutes a conflict is quite liberal. Apparently there is a conflict whenever one court admits evidence and another does not--the results, and not legal principles, seem to be the government's primary concern. In fact, there is a remarkable consistency in the approach lower courts have adopted in assessing questions such as the one presented here. That approach is controlled by this Court decisions in Ohio v. Roberts, 448 U.S. 56 (1980) and Dutton v. Evans, 400 U.S. 74 (1970). Indeed, if there is a conflict to be discovered in this case, it is between the government's theory of the Confrontation Clause and the position adopted by this Court in Roberts and Evans.

In addressing defendant's Confrontation Clause claim, the Court of Appeals carefully avoided painting with a broad brush. Specifically, it did not hold, as the government now seems to suggest, that a loss of memory standing alone whould require suppression of a prior out-of-court statement. Rather, the Court carefully limited its decision to the facts and circumstances of this case. The question was whether the particular out-of-court identification at issue was sufficiently reliable to overcome Confrontation Clause concerns. Those concerns may have been triggered by the declarant's memory loss; they certainly were not resolved by it.

In sum, there is nothing about this case, either legally or factually, that merits this Court's consideration.

2. Facts.

On April 12, 1982, John Foster, a correctional officer at Lompoc Federal Penitentiary, was brutally assaulted by an individual wielding a metal pipe. Foster was beaten about his head and arm leaving him permanently disabled. At trial, Foster testified that he could not remember whether he had seen his assailant. 2 Transcript at 89-90. He further testified that although he knew defendant quite well and recognized him from daily interactions in the prison, Foster had no recollection of defendant assaulting him. Id. at 101. With respect to the assault, Foster testified that he entered a T.V. room in the prison, felt an impact on his head and looked down and saw blood on the floor. Id. Other than these bare details, Foster had no recollection of the incident.[3] See also id. at 116-117 (cross-examination). Importantly, Foster did not testify that although he had seen his assailant, he could not now remember who that person was. Rather, he testified that he could not remember whether, during the attack, he had seen his assailant at all.

Over defense counsel's objection,[4] Foster was permitted to testify that shortly before he was discharged from the hospital

---

3 In its Petition, the government states that Foster testified "that his assailant was armed with a piece of pipe." Petition at 6. This is incorrect. Foster did, however speculate that the weapon used against him "might" have been a pipe. 2 Tr. at 90-91. Foster certainly did not testify that he saw the weapon.

4 Defense counsel raised four objections to the introduction of any out-of-court identifications by Foster: 1) lack of personal knowledge; 2) hearsay not coming within the exclusion provided by Federal Rule of Evidence 801(d)(1)(C); 3) violation of the Sixth Amendment Confrontation Clause; and 4) violation of the Fifth

he met with Special Agent Tom Mansfield and that in response to a question from Mansfield, Foster stated that "Owens" had assaulted him. Id. at 95. Foster then picked defendant's picture from a photo-spread.[5] Id. at 97. Although Foster testified that there was no doubt in his mind at that time that defendant was his assailant, he could not at the time of trial recall why he had believed this. Id. at 112. Nor was any evidence introduced indicating that Foster had explained the basis for the identification to Mansfield at the time it was made. In fact, Foster testified that he did not know whether he had based his identification on statements that somebody else may have made to him or upon his own perceptions of the assault. Id. at 114. Evidence at trial indicated that during his one month stay in the hospital, Foster was visited occasionally by prison personnel and every day by his wife. Foster could not remember any of these visits. Id. at 96.

Also over defense counsel's objection, Special Agent Mansfield testified consistently with Foster that on May 5, 1982, in response to a question posed by Mansfield, Foster stated that "Owens" [the defendant] was his assailant. 5 Tr. at 24. Again, the basis for Foster's identification of defendant is not in any

---

Amendment Due Process Clause. 1 Tr. at 3-6.

5 The evidence showed that Foster and defendant were well acquainted with one another prior to the assault. Hence, the selection of defendant's likeness from the photo-spread added nothing to Foster's verbal response to the Mansfield question. It indicated only that Foster could recognize a photograph of defendant, a person with whom he was acquainted and whom he then believed to be his assailant.

manner suggested. Mansfield's testimony, like Foster's, reveals only that Foster believed on the date of the interview that defendant was his assailant. In addition, Agent Mansfield had attempted to interview Foster on a previous occasion during which Foster identified his assailant only as a person whose name rhymed with "coma." Id. at 22.[6]

The government also presented testimony from Dr. James B. Butterfield, the neurosurgeon who attended Foster during the latter's recuperation. 2 Tr. at 132. Dr. Butterfield testified that the nature of Foster's injuries could result in a gradual loss of memory or even a selective loss of memory. Id. at 161-70. This testimony permitted the jury to speculate whether Foster had in fact seen his attacker and, due to his injuries, had now lost all memory of that aspect of the assault. This, even though no evidence was introduced indicating that Foster had in fact seen his assailant.

The jury returned a verdict of guilty of Assault with Intent to Commit Murder. 8 Tr. at 4. The district court sentenced defendant to the maximum twenty year term to be served consecutively with defendant's current sentence. Id. at 31.

3. The Court of Appeals Opinion.

On appeal, defendant challenged the admissibility of Foster's out-of-court identification on three grounds. First, defendant argued that the government failed to establish that Foster's testimony derived from his own personal knowledge as required by

---

[6] The District Court permitted Dr. Ted Bader, the prison physician, to testify that Foster, in a conversation with Bader, had identified defendant as his assailant. 3 Tr. at 207-208. Foster did not recall any such meeting with Bader. 3 Tr. at 91.

Federal Rule of Evidence 602.[7] Since Foster could not remember whether he had seen his assailant and since he could not remember why he later identified defendant as the assailant, there was no basis upon which to conclude that Foster's out-of-court identification satisfied the personal knowledge requirement of Rule 602. Next, defendant argued that Foster's out-of-court statement was hearsay and not within the exclusion provided by Federal Rule of Evidence 801(d)(1)(C).[8] Specifically, defendant argued that Foster's memory lapse rendered him unavailable for cross-examination as required by Rule 801(d)(1)(C). Finally, defendant argued that introduction of the out-of-court identification violated the Confrontation Clause of the Sixth Amendment.

The Court of Appeals did not resolve the issues raised with respect to Rule 602 and Foster's lack of personal knowledge. Gov.App. at 4a-7a. It did conclude, however, that Rule 801(d)(1)(C)'s requirement that the declarant be "subject to cross-examination concerning the statement" mandated that the declarant be available to testify as to the underlying basis for the out-of-court identification. Gov.App. at 9a-11a. In the absence of such availability, the Court reasoned, there would be

---

[7] Federal Rule of Evidence 602 provides, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

[8] Federal Rule of Evidence 801(d)(1)(C) provides, "A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . one of identification of a person made after perceiving him."

no method for testing the reliability of the identification and, hence, Rule 801(d)(1)(C)'s hearsay exclusion would not be triggered. Id. at 10a. Since Foster was not available within the meaning of the exclusion, introduction of his out-of-court identification was error. Id. However, applying the "more probable than not" standard, the Court of Appeals concluded this error was harmless. Id. at 11a-12a.

In assessing the potential Confrontation Clause violation, the Court applied standards endorsed by this Court in Ohio v. Roberts, 448 U.S. 56, 65-66 (1980), Dutton v. Evans, 400 U.S. 74, 88-89 (1970) and California v. Green, 399 U.S. 149, 161 (1970). In this regard, the Court of Appeals observed that the admissibility of an out-of-court statement turned on whether the trier of fact has been given "a satisfactory basis for evaluating the truth of the [out-of-court] statement." Gov.App. at 13a (quoting Dutton, supra, 400 U.S. at 89 and Green, 399 U.S. at 161). The question in this case was whether Foster's particular loss of memory had so undermined the truth evaluating process as to render the out-of-court identification inadmissible.

The Court of Appeals noted three potential dangers to the truth seeking function that could be exaccerabated by a lack of effective cross-examination:

> First, misperception: the declarant may not have accurately perceived what he describes, or he may not have perceived it at all. Second, failure of memory: at the time the declarant makes his statement his memory may not correspond completely and accurately with his earlier perceptions. Third, faulty narration: the declarant, in his statement, may fail, either deliberately or inadvertently, to convey what he remembers accurately.

Gov.App. at 14a. Applying these considerations to the facts and circumstances of this case, the Court noted that two of the above dangers were implicated by Foster's lack of memory--misperception and failure of memory:

> No one, including Foster, knows whether (1) Foster actually perceived his assailant, (2) if so, whether his perception of his attacker was accurate, and (3) whether at the time of his out-of-court identifications he had any memory of having observed that assailant. Not even the most skilled cross-examiner could elicit information that would help reduce the dangers of misperception or failure of memory.

Gov.App. at 16a. The Court of Appeals did not, however, hold that the Confrontation Clause was automatically violated because of the above concerns. The out-of-court identification would still be admissible if the government could make a "showing of particularized guarantees of trustworthiness" as required by this Court in Ohio v. Roberts, 448 U.S. at 66. In order to make this determination, it was necessary to evaluate the four "indicia of reliability" described in Dutton v. Evans, 400 U.S. at 88-89 and implicitly endorsed in Ohio v. Roberts, 448 U.S. at 65-66.

The Court of Appeals described those indicia as follows:

> An out-of-court declaration is reliable if (1) the out-of-court statement does not contain an expression assertion about past fact, (2) the possibility that the out-of-court statement is founded on faulty recollection is extremely remote, (3) the circumstances under which the statement was made are such that it can be supposed that the declarant is not misrepresenting the facts, and (4) the declarant had personal knowledge of the matters asserted in the statement.

Gov.App. at 19a (citing Dutton, supra, 400 U.S. at 88-89 and Roberts, supra, 448 U.S. at 65-66). The Court of Appeals concluded that at least three of the four indicia of reliability (and perhaps all four) were not present in this case:

> First, Foster's out-of-court identifications contained express assertions of past fact. Second, we cannot say that the possibility is extremely remote that the out-of-court statements were founded on a faulty (or even total lack of) recollection at the time those statements were made. Third, we have no idea whether Foster's statements were based on information provided by others and whether he may therefore have unintentionally misrepresented the facts. As to the fourth indicium, it is unclear whether Foster had personal knowledge of the matters asserted in his identification of appellant.

Gov.App. at 19a. The Court of Appeals, therefore, concluded, "In view of Foster's loss of memory we simply cannot determine on the basis of the record before us whether the out-of-court identifications are trustworthy." Id. Accordingly, introduction of the out-of-court identifications violated the Confrontation

Clause.[9] The error was not harmless beyond a reasonable doubt. Gov.App. at 21a-23a.

THE WRIT SHOULD BE DENIED

There is no legitimate basis for granting a writ of certiorari in this case. There is no novel or pressing question of law calling for this Court's attention. The Court of Appeals merely applied straightforward principles of law established by this Court. In so doing, the Court of Appeals arrived at a conclusion with which the government happens to disagree. That happenstance is not, however, an adequate basis for granting certiorari. Nor is there is any legitimate conflict with decisions by other Courts of Appeals. The government's suggestion to the contrary derives either from an unfortunate misunderstanding of the term, "conflict," or upon a misreading of the cases discussed in the government's Petition.

---

[9] The Court of Appeals also noted, but did not resolve, a potential Due Process violation. Citing Manson v. Brathwaite, 432 U.S. 98, 116 (1977) ("a very substantial likelihood of irreparable misidentification"), the Court stated, because of Foster's complete loss of memory, there may have been a substantial likelihood irreparable misidentification in this case. Gov.App. at 20a n.13. Resolution of this point was unnecessary in light of the Court's holding with respect to the Confrontation Clause. Id.

1. There is no legitimate conflict with other circuits or with relevant state court decisions.

a. United States ex rel. Thomas v. Cuyler.

The government is correct that the Court of Appeals here specifically rejected an approach to the Confrontation Clause used by the Third Circuit in United States ex rel. Thomas v. Cuyler, 548 F.2d 460 (3rd Cir. 1977). Gov.App. at 17a. In Cuyler, the Third Circuit adopted the approach endorsed by Justice Harlan in his concurring opinion in California v. Green, supra, 399 U.S. at 172-189. Under that approach physical presence at trial is sufficient to satisfy the requirements of the Confrontation Clause even if a witness claims a complete memory loss. 399 U.S. at 174; Cuyler, 548 F.2d at 463. Quite clearly, the Court of Appeals here adopted a more flexible approach. The contention that the rejection of Cuyler created a conflict is, however, quite mistaken.

Cuyler was decided three years before this Court's decision in Ohio v. Roberts, supra. In Roberts, this Court carefully, clearly and specifically rejected the Harlan/Cuyler model, opting instead for what it described as a middle course between that approach and approaches which the Court found overly solicitous of defendants' interests. 448 U.S. at 65-68 n.9. That "middle course" involved an inquiry into the trustworthiness of the out-of-court statement using the "indicia of reliability" described in Dutton, supra. 448 U.S. at 65-66. Hence, in refusing to follow Cuyler, the Court of Appeals merely declined to follow a precedent that had been repudiated by this Court. Cuyler is not good law. The Ninth Circuit appropriately declined to follow it. Surely adherence to a superceding decision by this Court does not create a conflict within the meaning of this Court's discretionary jurisdiction.

The government contends, however, that the Roberts Court did not reject Justice Harlan's thesis of the Confrontation Clause. Petition at 13-14 n.4. Any fair reading of footnote nine of the Roberts majority opinion belies that contention. In footnote nine, the Roberts Court outlines various suggested approaches to the Confrontation Clause related to the introduction of hearsay against criminal defendants. 448 U.S. at 66-68 n.9. In so doing, the Court specifically refers to the approach suggested by Justice Harlan in Green as well as to other more liberal approaches. In rejecting these alternatives to the middle course, the Court states, "Our reluctance to begin anew is heightened by the Court's implicit prior rejection of principal alternative proposals, see Dutton v. Evans, 400 U.S., at 93-100 (concurring opinion), and California v. Green, 399 U.S., at 172-189 (concurring opinion)." 448 U.S. at 68 n.9. The latter reference is to Justice Harlan's opinion and theory. This certainly sounds like a rejection, and the text of the Roberts opinion confirms that conclusion. 448 U.S. at 65-66. In short, the Roberts Court made express what the Green Court had implied, the approach suggested by Justice Harlan (and adopted in Cuyler) was not acceptable to a majority of the United States Supreme Court.[10]

---

[10] Importantly, the Harlan/Cuyler approach has not been adopted by any other circuit. In fact, there appears to be no post-Roberts decision in the Third Circuit applying Cuyler. Indeed, the Third Circuit seems to have cast some doubt upon the rigid Cuyler approach even before this Court's decision in Roberts. See United States v. Bailey, 581 F.2d 341, 350-351 & n.15 (3d Cir. 1978). The only other case adopting the Harlan/Cuyler approach is People v. Pepper, 193 Colo. 505, 568 P.2d 446 (1977). That case, like Cuyler, was decided prior to this Court's decision in Roberts.

Finally, and contrary to the government's assertion (Petition at 13 n.4), Justice Harlan also repudiated the approach to the Confrontation Clause he had articulated in Green. Dutton v. Evans, 400 U.S. at 95 ("Nor am I now content with the position I took in concurrence in California v. Green . . . .") (Harlan, J., concurring). Moreover, although in his Dutton opinion Justice Harlan continued to embrace a narrow view of the Confrontation Clause as a limit on the rules of evidence, he found the Due Process Clauses of the Fifth and Fourteenth Amendments to be quite applicable. Id. at 96-97, 99. The appropriate inquiry under those clauses was whether the hearsay to be admitted "evince some likelihood of trustworthiness." Id. at 99. Thus, although Justice Harlan used a different constitutional vehicle, he arrived at the same conclusion as the plurality in Dutton: the admissibility of hearsay in a criminal case depends on potential trustworthiness. Compare 400 U.S. at 89 (plurality) with 400 U.S. at 99 (Harlan, J., concurring).

b. Other cases relied upon by the government.

The two other primary cases relied upon by the government in suggesting a conflict were also decided before this Court's decision in Roberts. United States v. Payne, 492 F.2d 449 (4th Cir.), cert. denied, 419 U.S. 876 (1974); United States v. Insana, 423 F.2d 1165 (2d Cir.), cert. denied, 400 U.S. 841 (1970). Of course, this pre-Roberts time frame limits the current relevance of these decisions; but even if this were not so, there is no conflict between those decisions and the immediate decision of the Ninth Circuit.

In United States v. Payne, the Fourth Circuit permitted the admission of a prior inconsistent statement even though the

declarant, at trial, claimed a lack of memory. However, before arriving at that conclusion the court assessed the trier of fact's ability to determine the truthfulness or reliability of the prior statement. 492 F.2d at 454. Concluding that a jury would be able to make such a determination on the facts and circumstances presented, the court found no violation of the Confrontation Clause. Id. That is precisely the approach adopted by the Ninth Circuit here.

Similarly, in United States v. Insana, the Second Circuit found no violation of the Confrontation Clause by admission of prior inconsistent grand jury testimony of a witness whose lack of recollection at trial was motivated by "a desire 'not to hurt anyone.'" 423 F.2d at 1170. The feigned lack of memory did not make the witness unavailable for cross-examination since, under the facts presented, it was not clear that "cross-examination would have been fruitless." Id. at 1168. Moreover, even if the witness were unavailable, the circumstances of this obviously feigned loss of memory corroborated the truthfulness of the prior out-of-court statements. Id. at 1170. Using similar principles, the Ninth Circuit in this case concluded that, under the immediate facts cross-examination was fruitless in that it would not assist the trier of fact in assessing the truthfulness or reliability of the out-of-court statement.

The primary distinction between the decision of the Court of Appeals here and the decisions of the courts in Payne and Insana is in the result. That distinction is quite understandable, however, given the facts of this case which a quite distinguishable from those in both Payne and Insana. Different results based upon different facts do not, however, create a certworthy case. So long as the courts adopt and apply the same legal principles there is no conflict. And clearly there is no such conflict here.

On pages 15-16 of its Petition, the government provides a string cite of ten other cases, nine of which are apparently thought to be in conflict with the decision of the Court of Appeals here. In introducing these cases, the government states, "In other cases as well, the courts of appeals have held that an assertion of partial or complete loss of memory by a witness does not result in a Confrontation Clause violation, as long as the witness is available for cross-examination and the memory lapse does not completely deprive the jury of its ability to determine the veracity of the declarant's out-of-court statement." Petition at 15. With the exception of the gratuitous modifier, "completely," the government's introduction is accurate. But how such a line of cases conflicts with the immediate decision is difficult to ascertain. In this case, the Ninth Circuit summarized its holding in a fashion strikingly similar to the above quotation from the government's brief:

> Because Foster could not be subjected to cross-examination that would afford the jury a satisfactory basis for determining the truth of his out-of-court identification, and because no "showing of particularized guarantees of trustworthiness" of the out-of-court statements was made, we conclude that appellant's rights under the Confrontation Clause were violated.

Gov. App. at 20a. It would appear, therefore, that there is no conflict. Rather, the circuits are in accord on the basic legal principles at stake with respect to the introduction of hearsay in a criminal trial.[11]

---

[11] It is true that in most of the cases cited by the government on pages 15-16 of its Petition, the relevant court concluded that the evidence was admissible under the facts presented. That, of course, has no bearing on whether an actual conflict on legal principle exists. The government's description of those cases, quoted above in the text, indicates that there is no such conflict. In addition, the bulk of these cases involved the admissibility of prior inconsistent/inculpatory statements made

In sum, the government's allegations of a conflict are plainly specious. The Court of Appeals decision is consistent with controlling decisions of this Court and with decisions of other circuits. The guiding principle is whether the out-of-court statement is trustworthy or reliable. The only literal conflict is with the Third Circuit's 1977 decision in Cuyler, supra. The approach adopted in Cuyler, however, was clearly rejected in 1980 by this Court in Ohio v. Roberts, supra. There is, therefore, no conflict within the meaning of Rule 19 of the rules of this Court.

c. Federal Rule of Evidence 803(5).

Having failed to establish a conflict, the government argues that the Court of Appeals decision in this case "would have serious adverse implications for . . . the past recollection recorded exception to the hearsay rule (Fed. R. Evid. 803(5))." Petition at 18. This contention is absurd. It is based upon an overly generalized and fundamentally incorrect description of the

---

by persons friendly to or familiar with the accused--a circumstance that supports rather than undermines the reliability of the prior statement. Such cases have very little factual similarity to the problem presented by the out-of-court identification at issue here. Thus, the difference in results is not surprising. Moreover, the Court of Appeals here recognized and discussed the distinction between the immediate case and those cases involving prior inconsistent statements and feigned losses of memory, Gov.App. at 16a-17a n.10, thus carefully limiting the scope of its own ruling and avoiding even the appearance of a conflict with those decisions.

Ninth Circuit decision. Id. at 19. Moreover, it reflects a basic misunderstanding of Rule 803(5) as well as this Court's decision in Ohio v. Roberts, supra.

Rule 803(5) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.

Fed. Rule of Evidence 803(5) (emphasis supplied). As the underscored portion of the rule indicates, Rule 803(5) is designed to protect precisely those concerns that animated the Court of Appeals decision in this case: the truthfulness or reliability of the out of court statements. How such consistency of purpose creates a tension between the decision below and Rule 803(5) is simply not explained.

The government does worry that evidence submitted under Rule 803(5) may have to be subjected to a case-by-case Confrontation Clause analysis. Petition at 19. This case, however, has no bearing on that question. In fact, to allay the government's concerns, it may well be that Rule 803(5)'s past recollection recorded exclusion--especially as written--is one of those "firmly rooted" hearsay exclusions for which constitutional reliability can be inferred in all cases. See Ohio v. Roberts, supra, 448 U.S. at 66. If that is not the case, then Ohio v. Roberts would require a case-by-case determination "of particularized guarantees of trustworthiness" before admission against an accused would be constitutional. Id. However, whichever of these two courses is the appropriate one is an issue not presented or in any manner implicated by the decision of the Court of Appeals in this case.

2. The decision below is fully consistent with this Court's opinion in Delaware v. Fensterer.

In Delaware v. Fensterer, 106 S.Ct. 292 (1985), the defendant claimed a violation of the Confrontation Clause based on in-court statements of an expert witness who could not recall the precise reason for having arrived at the conclusions stated. Preliminary to its holding, the Court observed, "This Court's Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination." Id. at 294. This case, of course, falls directly into the first category. It involves the introduction of out-of-court statements against an accused in a criminal trial. According to the Fensterer Court, under such circumstances the controling principles are found in Ohio v. Roberts, 448 U.S. 56 (1980), Dutton v. Evans, 400 U.S. 74 (1970) and California v. Green, 399 U.S. 149 (1970). Fensterer, supra, 106 S.Ct. at 294. However, the Fensterer Court noted that the situation before it fell into neither category and that, as a consequence of this, decisions involving out-of-court statements had no bearing on the resolution of the issue presented to it. Id. at 294-295. The Court rejected the defendant's claim.

Despite the clear distinctions drawn in Fensterer, the government now argues that the specific result of Fensterer should control the disposition of this case. Petition at 11. In so doing, the government contends that under the Confrontation Clause no distinction can be drawn between cases involving in-court testimony and cases involving the introduction of out-of-court statements. Yet, quite clearly, Fensterer is premised on precisely the opposite conclusion. 106 S.Ct. at 294-295. Indeed, the distinction is central to the Fensterer opinion.

Accordingly, as the Court of Appeals recognized, this Court's specific holding in Fensterer is not relevant to the immediate case. See Gov.App. at 12a-13a n.7.

The government is correct when it asserts that in California v. Green, supra, this Court raised but did not resolve the constitutional significance of a witness' lapse of memory with respect to the admissibility of a prior inconsistent statement. 399 U.S. at 168. However, it is equally clear that subsequent decisions in Ohio v. Roberts, supra, and Dutton v. Evans, supra, have provided lower courts with the means to assess such questions on a case-by-case basis. As stated earlier, that admissibility turns on the trier of fact's ability to assess the truthfulness or reliability of the out-of-court statement. Importantly, whether a trier of fact can do so with respect to any particular out-of-court statement will depend on the facts and circumstances surrounding that statement. This Court recognized that reality in Roberts and Evans and adopted the current approach only after carefully considering various alternatives including the one the government now endorses. Compare Roberts, 448 U.S. at 65-68 & n.9 and supra, pages 13-14 with Petition at 16.

If Fensterer has any relevance to this proceeding, it is in its unequivocal reaffirmation of Ohio v. Roberts, supra, and Dutton v. Evans, supra, as applied to cases involving out-of-court statements. 106 S.Ct. at 294. And, of course, those opinions did provide the framework for the Court of Appeals decision here. It is interesting that the government's only reference to either Roberts or Evans appears in a footnote. Petition at 13-14 n.4. Indeed, it would appear that the underlying theme of the government's Petition is have those decisions overruled or at least ignored. The government is, however, apparently unwilling to state its agenda so boldly.

3. The decision below, with respect to Federal Rule of Evidence 801(d)(1)(C), was correctly decided and is not in conflict with any circuit court decision.

Federal Rule of Evidence 801(d)(1)(C) provides in pertinent part: "A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . one of identification of a person made after perceiving him." The Court of Appeals held that, "[t]he cross-examination requirement of Rule 801(d)(1)(C) is intended to permit the opposing party to explore the trustworthiness of the extra-judicial statement of identification." Gov.App. at 10a. To this extent 801(d)(1)(C) was a codification of the Confrontation Clause as interpreted in Ohio v. Roberts, supra, and Dutton v. Evans, supra. Indeed, in concluding that 801(d)(1)(C) was not satisfied by the facts and circumstances of this case, the Court of Appeals relied upon its application of the Roberts/Evans principles. Gov.App. at 11a. Accord 4 Weinstein and Berger, Weinstein's Evidence at 801-98 to 801-99, 801-131 to 801-132 (1982). In light of the Confrontation Clause, the Ninth Circuit's decision does no more than ensure consistency between the Rule 801(d)(1)(C) and the Constitution.

In any event, no other court has directly confronted the 801(d)(1)(C) issue decided by the Ninth Circuit in this case and, considering the Court of Appeals' holding with respect to the Confrontation Clause, its interpretation of Rule 801(d)(1)(C) is at best dicta. The government, however, asks this Court to review that aspect of the decision, claiming that it violates congressional intent and that it is in conflict with other circuit court decisions. Both contentions are false.

The first is based on a very narrow reading of the legislative history behind the Federal Rules of Evidence. The

quotes upon which the government relies indicate only that 801(d)(1)(C) was designed to remedy situations in which a "witness can no longer recall the identity of the person he saw commit the crime." Petition at 21 (citing H.R. Rep. 94-355, 94th Cong., 1st Sess. 2-3 (1975)). Nothing the government relies upon, however, indicates a congressional desire to permit introduction of out-of-court identifications whenever a declarant has a memory lapse regardless of the impact on the truth-seeking process. And that is the precise question to which the Court of Appeals addressed itself.

Moreover, presumably the language of the rule is a reflection of congressional intent. That language is clearly more solicitous of an accused's rights than the government would have it. Thus, if a witness, at the time of trial, can no longer identify the accused, 801(d)(1)(C) would permit introduction of an earlier out-of-court identification so long as the declarant was "subject to cross-examination concerning the statement." The Court of Appeals correctly concluded that this latter limitation on admissibility was designed to create an opportunity for effective cross-examination, i.e., a cross-examination that would permit an assessment of the the trustworthiness or reliability of the out-of-court statement. That construction is fully consistent with the congressional intent to expand the availability of out-of-court identifications in a manner that comports with the truth-seeking process of the adversary system. It is also, unlike the government's construction of Rule 801(d)(1))(C), consistent with the mandates of the Confrontation Clause.

There are no decisions in conflict with the Court of Appeals interpretation of Rule 801(d)(1)(C). Not one of the three cases described by the government as in conflict addressed the issue decided by the Ninth Circuit here. Petition at 21. In each, the declarant was available for cross-examination with respect to the

underlying basis for the out-of-court statement. United States v. O'Malley, 796 F.2d 891, 899 (7th Cir. 1986); United States v. Ingram, 600 F.2d 260, 261 n.* (10th Cir. 1979); United States v. Lewis, 565 F.2d 1248, 1251-52 (2d Cir. 1977). O'Malley involved a straigtforward application of Rule 801(d)(1)(C) to a situation in which the declarant admitted making the out-of-court identification, but at trial denied that the defendant was involved in the crime. In Ingram, the rule is cited in a preliminary descriptive footnote having nothing to do with any issue raised by the defendant. The description of the rule in the footnote is quite general and fully consistent with the Court of Appeals decision here. Finally, the primary issue in Lewis was whether Rule 801(d)(1)(C) applied to out-of-court photographic identifications. There is nothing in Lewis to suggest that the the court there considered anything akin to the issue decided by the Ninth Circuit here. In short, there is no conflict even under the most generous interpretation of that term.

CONCLUSION

The government has provided no legitimate reason for invoking this Court's certiorari jurisdiction. To the extent any issue is presented by the government's Petition, that issue is fact specific to this case: whether the Court of Appeals reached the correct result (assuming there is an absolutely discernable "correct result"). Such a question is neither appropriate for nor worthy of this Court's consideration. The writ should be denied.

January 7, 1987

Respectfully submitted,

Allan Ides
Stanley Goldman

by _____
Attorneys for Respondent
James Joseph Owens

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within action; by business address is:

Loyola Law School
1441 West Olympic Blvd.
Los Angeles, CA 90015

On January 7, 1987 I served three copies of the RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on the interested parties in said action, by placing true copies thereof enclosed in a sealed envelope with postage thereon full prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Solicitor General Charles Fried
Department of Justice
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 7, 1987

Esther L. Martinez
Esther L. Martinez

REPLY BRIEF

No. 86-877

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES JOSEPH OWENS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-877

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES JOSEPH OWENS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

1. The court of appeals held that respondent's rights under the Confrontation Clause were violated by the in-court testimony of the assault victim, John Foster. Although Foster testified at length at trial, and although respondent's cross-examination of Foster was not restricted by the trial court, the court of appeals found that Foster's partial memory loss prevented him from being adequately cross-examined. As we explained in our petition (at 10-17), the court's ruling raises issues of great practical importance that have been identified but never resolved by this Court. In addition, the Ninth Circuit's opinion creates a conflict among the circuits concerning the constitutional significance, if any, of a witness's memory loss. Our submission is that a witness's memory loss has no Sixth Amendment consequence and that his physical presence at trial satisfies the Confrontation Clause as long as (i) he does not assert his Fifth Amendment privilege or otherwise refuse to testify, (ii) he is capable of understanding the proceedings, and (iii) the scope of cross-examination is not improperly restricted by the trial court.

Respondent's principal contention in opposing review (Br. in Opp. 1, 4, 20) is that the court of appeals' decision is merely a routine application of this Court's decisions in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), and *Dutton* v. *Evans*, 400 U.S. 74 (1970). That contention is without merit.

In both *Roberts* and *Dutton*, the issue was whether out-of-court statements were sufficiently reliable to be admissible in the absence of *any* cross-examination of the declarant at trial. In *Roberts*, the Court held that the admission of preliminary hearing testimony as a substitute for live testimony does not offend the Confrontation Clause if the evidence is reliable and the declarant is unavailable. The issue arose only because the declarant could not be found at the time of trial (448 U.S. at 60, 66). Similarly, in *Dutton* the Court held that under the circumstances of that case, the admission of an accomplice's out-of-court statement implicating the defendant did not violate the Confrontation Clause. The plurality reasoned that the accomplice's statement was sufficiently reliable to be admitted in the absence of any cross-examination.[1] As in *Roberts*, the declarant was not present at trial (see 400 U.S. at 88 n.19).

The issue in the present case, by contrast, is whether the Confrontation Clause is violated when the declarant is cross-examined at trial but acknowledges a partial memory loss. Neither *Roberts* nor *Dutton* purported to decide this very different question.[2] Moreover, the court

[1] Justice Harlan concurred in the result. Viewing the case as involving due process, not the Confrontation Clause, he concluded that there was no due process violation. 400 U.S. at 93-100.

[2] Indeed, in *Roberts*, the Court summarized its holding by stating (448 U.S. at 66 (emphasis added)) that "*when a hearsay declarant is not present for cross-examination at trial*, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' "

of appeals itself indicated that the Sixth Amendment issue raised in the case had been identified but never resolved by the Supreme Court (Pet. App. 12a). And despite respondent's claim that the court of appeals "merely applied straightforward principles of law established by this Court" (Br. in Opp. 11), he fails to cite a single case from this Court or any other court of appeals holding that the Confrontation Clause is violated by the in-court testimony of a witness who has suffered a partial memory loss.

Respondent also invokes *Roberts* in making the erroneous argument (Br. in Opp. 12) that the conflict among the circuits that we identified in our petition (at 13-16) is not a live one. Respondent concedes (Br. in Opp. 12, 17) that the Third Circuit, in *United States ex rel. Thomas* v. *Cuyler*, 548 F.2d 460 (1977), endorsed Justice Harlan's view in *California* v. *Green*, 399 U.S. 149, 188 (1970) (concurring opinion), that memory loss has no Sixth Amendment consequence, and that the court of appeals in the present case explicitly rejected that view.[3] He contends (Br. in Opp. 12-13), however, that *Cuyler* was effectively overruled by *Roberts*.[4] Specifically, he relies (Br. in Opp.

[3] Respondent does suggest (Br. in Opp. 13 n.10) that a subsequent Third Circuit case, *United States* v. *Bailey*, 581 F.2d 341, 350-351 & n.15 (1978), questioned the validity of *Cuyler*. That suggestion is clearly wrong. The court in *Bailey*, after noting that its resolution of the case avoided difficult Confrontation Clause issues arising from a lack of cross-examination, cited *Cuyler* and several other cases in a footnote, preceded only by the word "See." The court's citation of *Cuyler* can in no way be read to suggest that the validity of that case was being questioned.

[4] Respondent (Br. in Opp. 13 n.10) similarly dismisses as a pre-*Roberts* case the Colorado Supreme Court's adoption of Justice Harlan's approach in *Green* (*People* v. *Pepper*, 193 Colo. 505, 568 P. 2d 446 (1977) (cited at Pet. 14)). Respondent does not acknowledge the decision in *Robinson* v. *State*, 102 Wis. 2d 343, 353, 306 N.W. 2d 668, 673 (1981) (cited at Pet. 14), a post-*Roberts* case, in which the Wisconsin Supreme Court discussed with approval Justice Harlan's approach to memory loss in *Green* and indicated that it "might well be persuaded to follow its reasoning in the appropriate case."

13) on a footnote in *Roberts* (448 U.S. at 66-68 n.9) that discusses Justice Harlan's concurring opinions in *Green* and *Dutton*. As we explained in our petition (at 14 n.4), however, that footnote does not constitute a rejection of Justice Harlan's approach to the role of a witness's memory loss in Confrontation Clause analysis. Rather, the Court was simply noting that it has not adopted Justice Harlan's general thesis that the "Confrontation Clause requires only that [the] prosecution produce available witnesses" (448 U.S. at 67 n.9). Indeed, in *Delaware* v. *Fensterer*, No. 85-214 (Nov. 4, 1985), a post-*Roberts* case, the Court (slip op. 6) explicitly left open the question whether a witness's memory loss could ever amount to a Confrontation Clause violation. In short, nothing in *Roberts* casts doubt on the validity of the reasoning in *Cuyler*.[5]

---

[5] In addition to *Cuyler*, we cited several other cases, decided both before and after *Roberts*, in which the reasoning of the courts is at odds with that of the Ninth Circuit in the present case (Pet. 14-16). Two of the principal pre-*Roberts* cases are dismissed by respondent on the basis of that chronological fact (Br. in Opp. 14). As noted above, however, respondent's reliance on *Roberts* is misplaced. Respondent also contends that, apart from *Cuyler*, all the cases cited in our petition are "in accord [with] the basic legal principles at stake" (Br. in Opp. 16). In fact, however, the reasoning in those decisions is in accord with the *dissent* in the present case (see Pet. App. 29a), not with the majority. The majority found a constitutional violation by erroneously focusing on the quantity and quality of "information" concerning the assault that Foster was able to provide (see Pet. App. 16a). By contrast, in the cases cited in the petition, the courts found no Sixth Amendment violation, notwithstanding severe (and in some cases total) memory loss concerning the relevant facts, because the witnesses were subject to cross-examination and the juries therefore were able to evaluate their credibility. See, *e.g.*, *United States* v. *DiCaro*, 772 F.2d 1314, 1327 (7th Cir. 1985) (holding that despite witness's severe memory lapse, there was no denial of the right to confrontation

Respondent further contends (Br. in Opp. 14) that in *Dutton* Justice Harlan himself abandoned his approach in *Green* on the issue of memory loss. But as we explained in our petition (at 13 n.4), Justice Harlan indicated in *Dutton* (400 U.S. at 95) that he was retreating from his suggestion in *Green* that the government has an obligation to produce witnesses who are reasonably available. This revised view—which *reduced* the government's obligations under the Confrontation Clause—can in no way be read as a repudiation by Justice Harlan of his position in *Green* that a witness's memory loss has no Sixth Amendment significance.

Respondent is similarly incorrect in asserting (Br. in Opp. 19-20) that this Court's decision in *Delaware* v. *Fensterer, supra,* has no bearing on the issues presented here. Respondent claims (Br. in Opp. 19) that *Fensterer* is "premised" on the fact that no out-of-court statement was involved, and that the case therefore is limited by its terms to that context. But as we noted in our petition (at 12), both *Fensterer* (slip op. 6) and *Green* (399 U.S. at 168-169) raised but explicitly did not reach the question whether an out-of-court statement can be admitted, consistent with the Confrontation Clause, when the declarant asserts a

---

because the witness was "questioned extensively on the stand concerning both his claim of amnesia and other matters relevant to the credibility of his prior grand jury testimony"), cert. denied, No. 85-1007 (Mar. 24, 1986); *Vogel* v. *Percy*, 691 F.2d 843, 846 (7th Cir. 1982) (noting that "[a]though petitioner's cross-examination * * * might have been more fruitful if [the witness] had not suffered a memory lapse as to his prior inconsistent statement, the petitioner was afforded adequate opportunity to test [his] lack of recall"). See also Pet. 14-15 (discussing cases).

total or partial memory loss.[6] The present case gives the Court the opportunity to resolve that important question.[7]

---

[6] As indicated in our petition (at 11), we believe that the reasoning in *Fensterer* should apply in the present case. In our view, there is no analytical distinction, for confrontation purposes, between the admission of the results of an out-of-court scientific analysis, when the witness has forgotten how he derived those results, and the admission of an out-of-court identification, when the witness does not fully remember the underlying incident. The critical factor in both *Fensterer* and the present case is that the defense was able to "probe and expose" the witness's memory loss and to "call[] to the attention of the factfinder the reasons for giving scant weight to the witness' testimony" (slip op. 6-7).

[7] Respondent makes several additional claims, all of which lack merit. First, while respondent does not deny that Foster had a detailed memory of the out-of-court identification and of the events leading up to the assault, he contends (Br. in Opp. 5) that Foster's only memory of the assault itself was that he entered the TV room, was struck on the head, and looked down and saw blood. Respondent overlooks several important facts. For instance, Foster recalled that he injured his finger by jamming it into his assailant's chest (2 Tr. 100), a fact that was confirmed by the medical evidence (*id.* at 135). Foster also recalled that the weapon used to strike him was a pipe (*id.* at 90-91). Respondent claims that we misstated the record on the latter point (Br. in Opp. 5 n.3), but the testimony confirms the accuracy of our description (2 Tr. 90-91):

> Q. [By the prosecutor]: Do you remember today, as you think back to April 12 of 1982, what might have been used to hit you in the head?
>
> A. [By Foster]: Thinking back, it did have to be a pipe. That is about the right size. I have seen so many of them around, picked up so many that it seems to me that that is what it would be.

Second, respondent makes the erroneous assertion (Br. in Opp. 3 n.2 (citing Pet. 17 n.6)) that we have conceded that without Foster's testimony the government's case was weak. We made no such concession. The point we were making in the footnote cited by respondent was that under the case law, respondent should have been barred from asserting a denial of his confrontation rights, since he *caused* the memory loss about which he now complains. We noted that some courts require a preponderance of evidence on causation, while other

In sum, despite respondent's contention that the court of appeals simply applied well settled principles to the facts of this case, we submit that the court of appeals has given the Confrontation Clause a meaning that it was never intended to have. Review by this Court is necessary to correct the Ninth Circuit's erroneous Sixth Amendment analysis, to answer the question left open in *Fensterer* and *Green*, and to resolve the conflict among the circuits.

2. With respect to the second issue presented in our petition—namely, the court's ruling that Foster's testimony violated Fed. R. Evid. 801(d)(1)(C)—respondent does not seriously dispute our submission (Pet. 19-20) that the court's interpretation is contrary to the literal language of the rule.[8] Rather, respondent contends (Br. in Opp. 21) that the government has adopted "a very narrow reading of the legislative history." But as we noted in our petition (at 21-22), and as prior cases from other circuits have indicated (see *ibid.* (citing cases)), the purpose of Rule

---

courts require clear and convincing evidence. Far from conceding the weakness of our case, we simply pointed out that under either standard, respondent should have been prohibited from asserting a confrontation violation. Pet. 17-18 n.6. In any event, if respondent is of the view that our petition conceded the weakness of the government's evidence at trial, then we cannot understand why he also criticizes us (Br. in Opp. 2-3) for purportedly implying that our evidence was strong.

Third, respondent dismisses as "absurd" (Br. in Opp. 17) our concern (Pet. 10, 18-19) that the Ninth Circuit's opinion may invite constitutional challenges in cases involving the past recollection recorded exception to the hearsay rule. But as we indicated (see Pet. 18-19 (citing cases)), defendants have frequently tried to make such arguments in the past. The Ninth Circuit's holding that a witness's memory loss has constitutional significance may breathe new life into such arguments.

[8] As we explained (Pet. 20), the rule requires only that the witness be subject to cross-examination "concerning the statement," not concerning "the subject matter of [the] statement" (compare Fed. R. Evid. 804(a)).

801(d)(1)(C) is to permit out-of-court identifications when the declarant is present in court, even when he has suffered a memory loss concerning the underlying events. The court of appeals' decision frustrates that legislative intent.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

JANUARY 1987

U.S. GOVERNMENT PRINTING OFFICE 1987—181-483/40188

JOINT

APPENDIX

No. 86-877

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES JOSEPH OWENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

ALLAN IDES
Loyola Law School
1441 West Olympic Boulevard
Los Angeles, CA 90015-1980
(213) 736-1054
(Counsel for Respondent)

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
(Counsel for Petitioner)

PETITION FOR A WRIT OF CERTIORARI FILED DECEMBER 1, 1986
CERTIORARI GRANTED FEBRUARY 23, 1987

TABLE OF CONTENTS

*The opinion of the court of appeals is printed in the appendix to the petition for a writ of certiorari and has not been reproduced.

Chronological List of Relevant Docket Entries

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(Los Angeles)

UNITED STATES

v.

JAMES JOSEPH OWENS, CR-83-00630-01

Date	Proceedings
07.27.83	Indictment filed
08.22.83	Arraignment held; Order appointing attorney to represent defendant; Defendant enters plea of not guilty; Trial Date set for 10.25.83
10.03.83	Motion hearing held; Trial Date continued until 12.13.83
11.23.83 through 12.02.83	Various orders requiring appearance of inmate witnesses issued
12.08.83	Status hearing held; Trial Date reset to 12.15.83
12.12.83	Motion to dismiss hearing held; Motion to dismiss denied
12.14.83	Defendant's memorandum of law re: admissibility of out-of-court identification filed
12.15.83	Trial held—jury sworn
12.16.83	Trial held
12.20.83	Trial held
12.22.83	Trial held
12.23.83	Trial held
12.27.83	Trial held
12.28.83	Trial held

12.29.83	Trial ends; jury verdict of guilty
01.23.84	Sentencing of defendant; judgment and commitment issued
01.24.84	Notice of appeal filed

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-5015

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE,

v.

JAMES J. OWENS, DEFENDANT/APPELLANT

Date	Filings-Proceedings
11.21.84	As of 11.09.84 argued and submitted
04.08.85	Opinion filed-reversed and remanded
07.11.85	Petition for rehearing with suggestion for rehearing en banc filed as of 07.02.85
09.02.85	Order filed—petition for rehearing and the suggestion for rehearing en banc is rejected
09.11.85	Mandate issued
11.12.85	Order filed granting appellee's motion to recall the mandate
12.12.85	Received notice from Supreme Court of filing of petition for certiorari

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

November 1982 Grand Jury

CR 83-630

UNITED STATES OF AMERICA, PLAINTIFF,

v.

JAMES JOSEPH OWENS, DEFENDANT.

INDICTMENT
18 U.S.C. § 113(a):
Assault With Intent To Commit Murder

FILED JUL 27 1983

The Grand Jury charges: (18 U.S.C. § 113(a))

On or about April 12, 1982, at the Federal Correctional Institution at Lompoc, California, within the special maritime and territorial jurisdiction of the United States, defendant JAMES JOSEPH OWENS did assault John Edward Foster with intent to commit murder.

A TRUE BILL

/s/ STEPHEN S. TROTT
Stephen S. Trott
United States Attorney

/s/ _____
Foreperson

EXCERPTS OF TRANSCRIPT OF HEARING ON MOTION TO EXCLUDE TESTIMONY OF JOHN FOSTER, DECEMBER 12, 1983

[C-26] MS. LEVINE: I believe the next thing on our list was the testimony of John Foster. Was that on the Court's list?

THE COURT: Yes, What is this? Whether he [C-27] is competent to testifly or what?

MS. LEVINE: Yes, your Honor. His ability to recall.

We went to Lompoc on Friday and went to Mr. Foster's home and spoke to him, and what Mr. Foster told us in essence was that he is unable to recall the identity of his assailant based on the fact of the assault.

What he recalls is based on interviews he has had with Agent Mansfield.

And what I would ask is that prior to his testifying as to the identity of Mr. Owens as his assailant, that he be taken on voir dire outside of the presence of the jury to determine whether he has any present recall for the identity of the person who assaulted him.

What Mr. Foster told us was, we asked him if he could recall who hit him, and he said, "Well, James Owens hit me."

And we said, "How do you recall that?"

And he said, "Well, I don't remember it from the incident"— now I'm paraphrasing, but this is the substance — "What I remember is telling Agent Mansfield that Mr. Owens did it, and because I told him that, I must have known that at some point, but I can't remember it right now."

Our fear, your Honor, is that if Mr. Foster takes [C-28] the stand and testifies that Mr. Owens was the assailant, which I suspect he may do, and we are able to cross-

examine him and bring out the facts that I have just laid out, it will be a case of trying to unring the bell.

Mr. Foster represents a very sympathetic picture. He is obviously a victim of an assault, and in looking at him, you can tell the assault was a brutal assault.

And I don't want to be put in the position of telling the jury to disregard something they have already heard when the person would not be testifying from his personal knowledge about that.

THE COURT: Mr. Fahey, is that essentially an accurate summary of his testimony on that part?

In other words, is that what your offer of proof would amount to?

MR. FAHEY: At this point in time, yes, your Honor. But I'd have to add a qualification to that, if I might.

I've been in frequent and regular contact with Dr. Butterfield, who is the neurologist/neurosurgeon who has been treating John Foster for about a year and a half, and he has informed me and he will testify at trial that the memory of Mr. Foster is something that comes and goes over a time period.

It is possible that in trial when confronted [C-29] by a person who the government accused of assaulting Mr. Foster, his memory may return. I don't know if that is the case or not.

In any event, I'm not going to put that witness on or any witness and say who assaulted Mr. Foster, rather as is typical of a case of this nature as your Honor has heard cases of this sort.

I am simply going to bring Mr. Foster through the chronology; ask him at any time if he can identify his assailant, and if he can do it at trial. He many not be able to, but he is competently able to testify, and in the trial memo I'll file with the Court there are substantial rules of evidence in criminal cases that he can testify.

A witness is not rendered incompetent because at trial proceedings he cannot identify his assailant.

THE COURT: Wait a minute. His testimony will be, "I don't remember it today, but I remember on X date that I did identify him"?

MR. FAHEY: It may be that, although I'm not sure. He may be able to remember a particular date. Because his counsel knows, and I'm about to tell the Court on a couple of occasions Mr. Foster was able to identify his assailant, and on one he was not.

His memory comes and goes. I don't know what [C-30] his memory is going to be when the trial starts, and it may depend on what day we call him.

I am going to ask him about prior communications with various individuals, and whether he was able to make an identification.

THE COURT: What is your response to the defense request for voir dire on this subject?

MR. FAHEY: Well, I don't see any reason for it, your Honor. But if the Court is so inclined—

The reason I don't see any reason for it is, assuming Mr. Foster at the time he is called as a witness, says "I don't have a present recollection," then he's still a competent witness. He can testify to events and I anticipate he will be able to testify as to —

THE COURT: Just a moment. If he says, "I have no present recollection of who assaulted me," then are you going to ask him, "Do you remember that you recalled that in the past?"

MR. FAHEY: In substance or effect, your Honor, yes.

We will go back into it, and I hope to lay a foundation for it.

THE COURT: Aren't you getting to the admissibility of that testimony?

MS. LEVINE: First, I was getting to the [C-31] admissibility of his testimony on the stand identifying Mr. Owens at this point. I'm not trying to keep Mr. Foster off the stand completely. I don't think I would have a right to do that.

He has events clear in his mind that he can testify to that are relevant evidence.

The second question is, what kind of prior statements are admissible, and I hadn't planned on addressing that at this point.

I was intending to address only the question of whether— can Mr. Foster identify Mr. Owens from the stand on voir dire out of the presence of the jury to determine whether at this point he can remember him.

MR. FAHEY: Your Honor, may I be heard in response?

THE COURT: Go ahead.

MR. FAHEY: Mr. Foster suffered a serious assault, whether by Owens remains to be seen. To put him through the rigors of multiple cross-examination is unfair.

But, as a citation for the Court at this point, Rule 801(d)(1)(C) clearly makes admissible a statement of identification by a person of a person made after perceiving him.

I intend to file with the Court today several cases, including recent cases in the Ninth Circuit in which a person who has no present recollection of events that [C-32] occurred perhaps a year or two years earlier is able to testify at one point in time that he or she was able to identify somebody, is now clearly admissible evidence. And for Mr. Foster to be put through the rigors of a hearing outside of the presence of the jury simply so that counsel can satisfy herself on how to make objections later in trial is especially inappropriate when that evidence is contemplated by the rules.

MS. LEVINE: If I may, your Honor, I'm not intending to put Mr. Foster through this to satisty myself.

What I am intending to do is give Mr. Owens the fairest trial to the best of my and Ms. Gomez' abilities.

If an individual cannot remember something and told both myself and the government that it cannot at this moment remember it, and I note to the Court, although Mr. Fahey did not tell us that it is obviously Brady material, I think that is something not to be put before the jury to find out whether or not he has a present recollection, and without finding out if he can recall anything at this point.

The first question we put to Mr. Foster is how is your memory.

THE COURT: That gets us to whether or not the statement is admissible under 801.

[C-33] MS LEVINE: It is a hearsay statement, and I think there is an exception.

THE COURT: That is what it relies on, whether it is admissible under 801, and I guess for that matter under 803 and 805.

But I am going to— I can't rule on this now. I am going to reserve on this for now.

Did you say that you were filing a recent Ninth Circuit case?

MR. FAHEY: Yes. It was a recent Ninth Circuit case in front of Judge Waters, and had to do with a witness in a bank robbery who was unable to at the time of trial identify the person who robbed the bank, but had made prior statements in which she had identified the defendant.

And both the agent, as well as the witness, were able to testify as to those prior statements of identification.

THE COURT: I am going to reserve on this issue until —

When do we start trial, Thursday? Is it Thursday morning?

MR. FAHEY: Yes, your Honor.

THE COURT: I may ask for a further offer of proof, and you may have a good idea of the witness' condition by then.

[C-34] MR. FAHEY: Yes, your Honor. Frankly, it is almost a day-to-day thing.

THE COURT: So we will reserve on that.

* * * *

EXCERPTS OF TRIAL TRANSCRIPT OF PROCEEDINGS ON DECEMBER 13, 1983

[3] THE COURT: Good morning. The clerk says we have some matters to take up before we get the panel down; is that right?

MS. LEVINE: That is correct, your Honor. Late yesterday, my office filed a memorandum of law regarding the admissibility of John Foster's out-of-court statement. I wonder if the Court had an opportunity to see and read that memorandum.

THE COURT: I read that this morning. I read the government's trial memorandum last night.

I suppose it is subject to reconsideration after I hear what is going on. But on the basis of what I know now, I am going to rule that that testimony is admissible. I think it is foursquare within the Elemy case, and Elemy addresses only the hearsay problem and not the confrontation problem. I think in this [4] instance, because the witness is going to be here to testify, the confrontation requirement is also satisfied.

I am not going to say I will not reconsider it after I hear what is going on. As of now, I am not going to bar the testimony. The ruling on that is that the witness Foster may testify in court here. For that matter, others may also

that he made an out-of-court identification. That is the ruling.

MS. LEVINE: Your Honor, so there will be no hearing as to whether he had personal knowledge on which to base that identification?

THE COURT: There will be no hearing as to whether he has personal knowledge?

MS LEVINE: That is correct.

THE COURT: As the basis of his identification?

MS. LEVINE: Yes, your Honor.

THE COURT: My understanding from the offer of proof is that the out-of-court identification was based upon the fact that he was a percipient witness.

MS. LEVINE: According to Mr. Foster, what he told us was he cannot recall viewing his assailant at all which makes him not a percipient witness to who the assailant is.

THE COURT: Mr. Fahey, what was the basis of the out-of-court identification?

[5] MR. FAHEY: Well, your Honor, the full offer of proof is that while — and just like the Elemy and Lewis case — is while Mr. Foster may not have a present recollection of what occurred, two weeks after he had a full and total recollection of what occurred. That was the statement he gave to Agent Mansfield, and he will, I expect, when he testifies, that is, Foster, adopt that previous statement and say that he remembered it at that time, and it was a truthful statement at the time.

THE COURT: Ms. Levine just said that according to her interview of him — well, maybe that just goes to impeachment. I do not know. That is a variance of what Mr. Fahey is saying, right?

MR. FAHEY: She took the additional step and inquired about the circumstances in the previous interview.

MS. LEVINE: We spoke to Mr. Foster about this at some length. It would not be impeachment. It goes directly to his ability to testify as a percipient witness.

THE COURT: The reason I said impeachment is that it is at variance with what Mr. Fahey said occurred at the interview. In other words, he said he remembered everything that happened, and based upon that recollection, he made the identification.

MS. LEVINE: What Mr. Foster told us is that he recalls making a statement to Agent Mansfield, but he [6] cannot recall why he made that statment. The only thing he recalls from being in the hospital and the assault regarding Mr. Owens is that he made a statement to Mr. Foster about Owens. He does not recall why he made it, and he does not recall seeing the assailant.

THE COURT: He does not recall today.

MS. LEVINE: That is correct. And he does not know if he recalls then. All he recalls is making a statement.

THE COURT: It does not matter whether he recalls today. If he said at the time he made the statement that was based upon personal knowledge then it is admissible under the Elemy case.

MS. LEVINE: Elemy admitted the statement because the witness could recall why he made the statement, although, the witness was unable to recall the identification at that point.

In this case, the witness cannot recall why the statement was made. Mr. Foster's memory is so bad, he does not know who visited him, and he does not know if the people who visited him told him that Owens was the assailant or not. And not knowing that, his identification is totally unreliable.

THE COURT: I think that just goes to the weight of the evidence. It is still admissible.

* * * *

EXCERPTS OF TRIAL TRANSCRIPT OF PROCEEDINGS
DECEMBER 16-28, 1983

[Testimony of John Foster] [2-71]

DIRECT EXAMINATION

BY MR. FAHEY:

Q. Mr. Foster, how old are you, sir?

A. 63 years.

Q. In what city are you now living?

A. I live in Lompoc.

Q. Are you married, sir?

A. Yes, sir, I am.

Q. Are your presently working?

A. Negative. I'm on Workman's Compensation.

Q. What is the last day you were able to work?

A. April 12th, 1983 —

Q. Was it 1982, sir?

A. 1982. I am sorry.

Q. Now, were you previously working for the United States [2-72] Bureau of Prisons?

A. That is affirmative.

Q. When did you first start working with the Bureau of Prisons?

A. December 9th 1969.

Q. And the last you worked for.the Bureau of Prisons was April 12th of 1982?

A. That is affirmative.

Q. Sir, did you serve in the military?

A. Yes, I did.

I put in 24 years active, plus three years with the International Guard as a full-time technician.

Q. Did you receive any commendations in the military?

MS. LEVINE: I object, your Honor, irrelevant.

MR. FAHEY: Your Honor, it is just foundational.

THE COURT: All right. The objections is sustained after this question.

You can answer that question, Mr. Foster.

BY MR. FAHEY:

Q. Did you receive any commendations for your military service?

A. Yes, sir, I did.

I received the Air Force Commendation Medal and the Bronze Star on retirement.

Q. Now, when you joined the Bureau of Prisons in 1969, [2-73] which prison were you assigned to?

A. FCI Lompoc, the Federal Correctional Institute.

Q. Is that now the United States Penitentiary at Lompoc?

A. That is affrimative.

Q. What was the first job you held when you started at the Lompoc prison?

A. Correctional Officer Trainee.

Q. Now, were you at Lompoc for the entire 13 years you were with the Bureau of Prisons?

A. That is affirmative.

Q. While you were at Lompoc for those 13 years, did you make an attempt to get along with all of the inmates inside?

A. Yes, I did.

I have full rapport with the majority of them.

Q. Sir, well you tell the jury, please, when you became a correctional counselor?

A. I believe it was December of 1979.

Q. Could you describe very briefly for the jury what duties you had as a correctional counselor?

A. The duties that I had as a counselor were varied, and mainly because I had —

We had such a shortage of help, that we had to work as a correctional officer for one-half of the week, and the other half of the week work as counselor.

But the work as a counselor was assisting the [2-74] inmates in problems they had, such as phone calls to parents, phone calls to family, phone calls to attorneys.

And also we were called on for UDC, which is the Unit Disciplinary Committee.

When a charge was brought on any type of a problem that an inmate was considered guilty of, the UCD or Unit Disciplinary Committee would be called on first, which would usually call for a counselor and the unit manager or the unit case worker, and we'd go over the problem—either dismiss it or pass it on to the Institutional Disciplinary Committee.

Q. So you attended some of those meetings.

Is that right?

A. I have attended the IDC, the Institution Disciplinary Committee, usually as a character witness.

Q. On occasion would you testify for inmates?

A. That is affirmative.

Q. As to their character?

A. Yes, that's right.

Q. Did you ever assist inmates in getting particular jobs within the institution?

A. That is affirmative.

Q. How does that work?

A. Well, when we found out there were jobs open, the inmate would be talking to us about what they wanted.

[2-75] They try to assign them where it would fit, you know, where it would fit the man's talents.

Q. That would include, for example, in the industries area—the mechanical services area?

A. That is affirmative—that and the, oh, the library.

The food service was another big one.

Q. Orderlies, for example?

A. Orderlies within the units.

Q. When were you assigned to J Unit? Do you recall approximately when that was?

A. I am sorry, I didn't hear you.

Q. When were you assigned to J Unit?

A. I believe it was on my promotion in December of 1979, but I had to stay on the job.

I was on for 30 days, which is part of the system on promotion.

You have 30 more days to work on the job you are on, and then the lieutenant had me—probably the captain—had me stay two weeks as an acting lieutenant.

So in January I went to J Unit as a counselor.

Q. So that would have been in January of 1980?

A. That is affirmative.

Q. After you were assigned as a counselor to the J Unit in early 1980, did you ever perform the duties of a correctional officer?

[2-76] A. Yes.

As I said before, one week when we were so short of help we'd have to work as a correctional officer.

In J Unit we were working two and a half days as a correctional officer and two and a half days as a counselor.

Of course, a lot of the things that a counselor would do could be done while you were a correctional officer when a man is just coming to you asking you questions.

Q. What additional duties would you have to do as a correctional officer?

Would you be responsible for the movement of inmates, for example?

A. That is affirmative.

Q. Any other kinds of duties that you can describe today?

A. Well, we would—

When we had inmates that were assigned at different hours, say to school, hobby shop, things like this—they would go at different hours than when the work whistle would blow in the morning, which would be at 8 o'clock—10 minutes to 8:00 it would ring.

Q. So you would be responsible for getting those inmates over to the job, the school or something like that?

A. Just as far as the door.

[2-77]Q. Responsible for getting them out?

A. All we were responsible for was getting them out the front door of the unit.

Q. And they had to find their own way after that, I take it?

A. Right.

Q. Did you have an office in J Unit as a counselor?

A. Yes, I did. It was in—

It was out of the main area of the unit. It was off to the side. It used to be a TV room, and they broke that down into offices.

Q. Can you see Government's Exhibit 3 here on the board, sir (indicating)?

A. Didn't hear you.

Q. Can you see Government's Exhibit 3, this exhibit here (indicating)?

A. Yes, I see it.

Q. Is this a picture of J Unit, the front of J Unit?

A. Yes, it is. That is the front of J Unit.

Q. Can you tell the jury which general area your office was located in J Unit?

A. If you are looking down the range toward the blue range and the office there in blue.

Q. This area where I am now pointing (indicating)?
A. Right, right. And there is a door next to it.
[2-78] Q. This door I am now pointing to (indicating)?
A. Yes, the door past the storage area.
Q. Yes.
A. And we would go in through there, and there was a sliding door to let you into the counselor's office in J Unit.
Q. And that is where your office was located?
A. That's affirmative.
Q. Now, you mentioned a few minutes ago that sometimes you have duties as a correctional officer.
Is that correct?
A. That's correct.
Q. And part of those duties was to let inmates in and out of the units?
A. That's affirmative.
Q. Now, on Government's Exhibit 3, there was a large door here with an exit sign in it.
Was that the door you would let inmates in and out of?
A. That is affirmative.
Q. And who has the key to that door?
A. The unit officer.
Q. The unit officer on duty at that time?
A. Well, he had a key, and we had a key—the counselors, if we were working as counselors.
[2-79] If we were working as unit officers, we had the unit keys that would handle anything.
Q. In April of 1982, what were your normal working hours?
A. 6:00 to 2:30—6:00 in the morning until 2:30 in the afternoon.
Q. Did you get a lunch hour?
A. We did, and in most cases I ate my lunch while I was doing paperwork, and then I would take a walk on down

and be talking to inmates in the corridor, inmates in the dining room; talk to the lieutenant in the dining room for the 30-minute break, and go back to the unit.
Q. So it is true that on a daily basis you spent most of your time inside of J Unit.
Is that correct?
A. That is affirmative.
Q. In April of 1982, how close were you to retirement?
A. I'd say eight months.
Q. While you were at Lompoc in April of '82, did you know an inmate named James Owens?
A. That's affirmative.
Q. Do you see him in court here today?
A. Yes, Seated over there (indicating).
Q. The individual who just nodded to you and waved?
A. Yes.
MR. FAHEY: Your honor, may the record reflect [2-80] that—
MS. LEVINE: We will stipulate that he has identified Mr. Owens.
THE COURT: All right. The record will reflect that stipulation.
Go ahead, Mr. Fahey.
MR. FAHEY: Thank you.
BY MR. FAHEY:
Q. How did you know inmate Owens at that time?
A. I am sorry, I didn't hear what you said.
Q. How did you know defendant Owens at that time?
A. I knew him as an inmate of the unit, and I made phone calls I believe for him to an attorney in Washington, but I can't remember who they were to.
Q. Did you have regular contact with him as one of the inmates inside of the unit?
A. That's affirmative.

Q. I want to talk about April 12th, 1982 for a moment, John.

What time did you get up that morning?

A. My usual time for working that shift was 4 o'clock in the morning.

Q. You would wake up about 4 o'clock?

A. Right.

Q. What time would you arrive at the institution?

[2-81] A. Probably around 25 to 6:00.

Q. When you got to the institution, did you have to report in with anybody?

A. That's affirmative.

I would go to the control room and turn in my key chits so that when I went to K Unit to pick up J's keys, the officers there worked two units on the morning watch from midnight to 6:00. And they had both units.

Then at 6 o'clock, I'd have my keys. After I got checked in with the control room, and gave them my key chits, went into the lieutenant's office and told him I was present.

Q. Who was the lieutenant present that day, do you know?

A. Lieutenant Cooksey.

And from there I went on down to the counselor's office and made a pot of coffee and poured myself a cup, and was in the office around 6 o'clock.

Q. In the counselor's office in J Unit?

A. No. I was in the unit officer's office.

Q. Is that just to the left of the counselor's office where this window is, this blue window (indicating)?

A. That's right.

Q. When you got inside the unit, had you locked the unit door leading to the main corridor?

Q. Yes. It was locked. I—

[2-82] Q. You came in and locked it behind you?

A. I locked it, but when I came in there I didn't come out through the front door.

I came in through the second door on the right that takes you into the counselor's office.

Q. When you walked down the corridor toward J and K Unit to pick up your keys, did you have anything on your belt—anything in the way of a radio or an alarm?

A. No, I didn't have anything.

I picked that up when I get down to K Unit. He has the body alarm for J Unit, and he has got the body alarm for K Unit.

So he gives me my keys to the unit and gives me the body alarm.

Q. Did you pick your body alarm up from the officer at K Unit that night?

A. That's right.

Q. And what did you do with it?

A. I beg your pardon?

Q. Did you test it?

A. No, because it is tested regularly on the shift. Somebody on each shift goes ahead and checks each one of them out with the control room and makes sure that the alarm signals is on at the control room, and that the voice part of it works when—

[2-83] I think it is eight seconds after the alarm goes into the control room, a red light comes on, and when the red light comes on, you can go ahead and talk into it and say what your problems are.

Q. John, is there a unit log book inside the J Unit?

Q. Yes, there is.

Q. What is the purpose of that log book?

A. Each officer, when he signs in, puts his name, number of inmates or the total count, the number of keys,

or you say "All keys and tools are counted for," and I always put unit coverage, extra unit coverage, because we are brought in early.

The counselors are to handle the office. Somebody has to be there from 6:00 til 8:00 anyhow because of breakfast.

Q. Excuse me. And that was you on that date?

A. For two and a half days a week I had that job.

Q. So after you made your pot of coffee that morning inside the office, did you make any entry in the log book?

A. Yes. I made my entries.

And you also make other entries in there—anything that happens during the course of the day, you are supposed to keep a regular log of what it is, the log book.

MR. FAHEY: Your Honor, the Government's Exhibit 22—it's a one piece of paper—a copy of a piece of [2-84] paper—may that be placed before the witness?

THE COURT: Yes.

THE CLERK: Plaintiff's Exhibit 22, marked for identification and placed before the witness.

(Plaintiff's Exhibit 22 marked.)

BY MR. FAHEY:

Q. John, can you tell the jury what that is, what that is a copy of, please.

A. I'm sorry?

Q. What is that a copy of?

A. This is a copy of a page out of the log book.

Q. Do you see any entries that you made on that date?

A. Correct. I wrote the date 04-12-82, day watch. The base count. We only work with the base count of 94.

Q. And that count of 94 was the number of inmates accounted for?

A. 94 had been counted on the shift earlier count, and then I put the earlier unit coverage, because I was there other than the 8 o'clock shift. I came in early.

Q. And did you sign your name?

A. I signed in and I put all keys and tools accounted for.

Q. Could you just hold that up a minute and point out to the jury where that entry is that you made.

A. (Witness complies)

[2-85] Q. You are pointing to the bottom third of the page?

A. The heavy black writing here is what I wrote.

Q. Thank you.

Your Honor, I would move Exhibit 22 into evidence.

MS. LEVINE: No objection.

THE COURT: Exhibit 22 is admitted.

(Plaintiff's Exhibit 22 received.)

BY MR. FAHEY:

Q. Now, John, did there come a time after you made the entry in that particular log that you received a telephone call?

A. Yes. There was a phone call.

I don't know the exact minutes, a few minutes after 6:00 when the phone rang and I answered it.

And Lt. Cooksey was on the line.

Q. Did you have a conversation with him?

A. Yes. Our usual bantering type of conversation.

He asked me if I wanted to feed him, meaning the inmates, and I said not particularly.

And he said, "Well, let's do it anyhow," and I said, "You're the boss."

And he said, "Let's go."

So I went ahead and opened the front door and started A, B, C, D, F ranges, opening all the lock boxes.

Q. Go through it slower.

[2-86] Now you said that after you got the call from Lt. Cooksey you opened the front door?

A. The big blue door. That is the one where they exit from the unit to the dining room.

Q. And then you proceeded to open which doors of which cells at that time?

A. All occupied cells.

We had the unoccupied cells tagged, so we didn't have to open them. We just opened the occupied cells.

Q. Could you explain briefly for the jury how you would go about opening the cells in a particular range.

A. It's necessary to use what is called a lock box key. You open—

You turn the key and open it all the way up into here, and there is pins, steel pins that open or close—

You put it in the down position and they are called in deadlock.

All of the pins in the deadlock position that we leave in deadlock are these unoccupied cells.

And you take all of those other ones and you put them in the up position, and when you get them all in the up position that you want, you turn the crank and it opens all of those cells, at which time you put the handle back in and close the door and go to the next range, and work your way from A, B, C, D and F.

[2-87] Q. So, John, you wouldn't have to go to each individual cell and unlock the door individually.

Is that right?

A. Not in that unit.

Q. You could do it from some kind of a remote area. Is that right?

A. Correct.

Q. Do you remember today which ranges you opened—in which order you opened the ranges?

A. I believe it was A, B, C, D, E and F.

I can't remember it, though.

Q. Now, after you unlocked the E and F ranges, those are up on the third floor; is that right?

A. That's affirmative.

Q. Where did you go next?

A. I went down to the TV room, which means that you have to come down half a level of the staircase.

There is a landing, and when you get to the landing there is a big door that takes you into the TV room, at which time I decided I wanted to check for contraband.

Q. So do you see the picture just to your left of the board behind you, sir?

A. Right.

Q. Is that the third floor of J Unit?

[2-88] A. That's affirmative.

Q. And where are the two ranges? Is the E range on the right?

A. The E range is over near the firebox, and the F range is over here (indicating).

Q. Now, you said that after you opened those two ranges you went to the TV room.

Is that right?

A. That's affirmative.

Q. And how did you get to the TV room? Could you use that exhibit to explain?

A. The staircase is by the firebox, and you go down the set of stairs six or eight steps, and there is a landing.

And when you come around the landing, the TV room is there, the big door and the door is up locked so that you open that door and go in.

Q. So this is Government's Exhibit 5 here, and as you went to the right on Government's Exhibit 5, you go down the stairs to the TV room.

Is that right?

A. That's affirmative.

Q. Now, what was the reason that you checked the TV room on that day, or on any other day?

A. Looking for contraband, which could be weapons, booze or drugs.

[2-89] Q. And had you on past occasions found contraband inside that TV room?

A. I haven't found much in there. Other people have, though. So it is a point where you are supposed to check every place in the unit at some time during your day.

Q. Did you normally check the TV room in the morning?

A. Not necessarily.

Q. Were you able to check the TV room that morning? Did you go inside of the TV room?

A. I beg your pardon?

Q. Did you go inside the TV room to begin your check?

A. That's affirmative.

Q. And what happened when you went inside of that TV room?

A. As I walked down to the wall, I looked in the radiator area first because things can be stuck inside behind there, and went over to the far wall and started walking down that side.

In some cases there are chairs there. I don't remember if chairs were there or not.

I guess I got partway down there. I don't know how far it was. Wasn't too far when I felt an impact on my head. And I don't know how many times.

I looked down and saw the blood on the floor, and I—

Now, I don't remember seeing at this time— [2-90] I don't remember seeing the individual. What I remember is telling Mr. Mansfield that—

MS. LEVINE: Objection, your Honor.

THE COURT: All right. The objection is sustained.

You have answered the question so far. Ask your next question.

BY MR. FAHEY:

Q. What is the next thing you remember after receiving the blow to your head?

A. The next thing I remember after receiving the blow to the head is many days later in the hospital.

Q. Which hospital was that?

Q. Marion Hospital.

Q. Do you remember today, John, who the person or persons were that hit you?

A. I am sorry, I did not hear you.

Q. Today, John, as you think back to April 12th, 1982, do you recall the person or persons that struck you on the head?

THE WITNESS: Negative.

MS. LEVINE: Objection, your Honor.

I withdraw it.

BY MR. FAHEY:

Q. Do you remember today, as you think back to April 12 of 1982, what might have been used to hit you in the [2-91] head?

A. Thinking back, it did have to be a pipe. That is about the right size.

I have seen so many of them around, picked up so many that it seems to me that that is what it would be.

Q. Are pipes common in the institution?

A. Oh, yeah. The plumbers have got them.

Q. And sometimes inmates have them?

A. I beg your pardon?

Q. Sometimes the inmates have them?

A. Oh, yeah.

Q. Are they sometimes used for weapons?

A. Right.

Q. How long were you at the Marion Hospital?

A. 30 days.

Q. Now, while you were at the Marion Hospital, did you receive some visits from your wife?

A. She told me every day, but I only remember the second to the last day I was there.

All the people who I know have visited me at that time, I don't remember any of them until the second to the last day.

Q. Do you remember a Dr. Bader visiting you?

A. That is negative.

Q. Do you remember Special Agent Mansfield of the FBI [2-92] visiting you?

A. Yes, sir, I do. That is vivid in my mind.

Q. And in relation to the day you got out of the hospital, how much before that did Special Agent Mansfield visit you?

A. It seems as if it must have been about two weeks. I can't give you an exact because I don't know.

Q. Approximately two weeks then?

A. I'd say so.

Q. Is this Special Agent Mansfield, Tom Mansfield that you talked to (indicating Agent Mansfield)?

A. That is affirmative.

Q. And he met with you at the Marion Hospital?

A. That is affirmative.

Q. John, Can you tell the jury, please, what—describe for the jury what injuries you received during the attack?

A. I received a fractured skull, the cuts right here (indicating), a broken arm and had to have a plate put in it.

Q. You were pointing to the area near your elbow?

A. That is affirmative.

Q. Anything else?

A. A broken finger on my right hand, middle finger—pretty stiff.

And I had a cut here and a cut here (indicating).

Q. You are holding up the inside of your right arm, and [2-93] where else?

A. My left cheek or jaw bone.

Q. Any bruises near your eyes or anything like that?

A. There is one stitch above the eyelid close to the eyebrow—there are several stitches in that area.

Q. You just pointed to your left eye.

A. That is affirmative.

Q. Can you tell the jury how your memory is today? How are you able to remember short- and long-term events?

A. My memory today is great for 40 years ago, but not for yesterday. It's hard for me to remember if I have to think of something that happened in the last couple of days, I don't—

In fact, sometimes it is a couple of minutes and it is just gone. There is no way I can keep remembering.

But like I say, 40 years ago, I could tell you the people I associated with and everything else at that time, but not now—not for recently.

Q. How is your hearing these days, John?

A. I am sorry?

Q. Are you having trouble with your hearing?

A. I am. Yes, I am.

My left ear is worse than my right one. It is dropping.

Q. Have you suffered from dizzy spells?

[2-94] A. That is affirmative.

I wear a patch for it. It helps a little bit, but it doesn't totally do away with the dizziness.

Q. Is that something the doctors prescribe for you?

A. Yes, it is scopolamine.

Of course, like if you tell a young fellow what scopolamine is, they wouldn't know. But anybody my age would know that it was the truth serum in those days, but isn't anymore. They use sodium pentathol now.

But this is mostly used for people getting seasick. If they wear them, they don't get seasick.

Q. You are pointing to your left ear?

A. It is a time-release medicine for three days.

Q. Does it help your memory at all?

A. Helps for the dizziness, and that's all.

Q. When you met with Special Agent Tom Mansfield before you got out of the hospital, did you tell him at that time who assaulted you?

A. That's affirmative.

MS. LEVINE: Objection, your Honor. Lack of foundation.

THE COURT: The objection is overruled.

BY MR. FAHEY:

Q. Did you tell him, sir?

A. Would you repeat.

[2-95] Q. Yes. When you met with Special Agent Tom Mansfield before you got out of the hospital, did you tell him who assaulted you on April 12th?

MS. LEVINE: Objection. Mischaracterizes the testimony as to when he met with Mr. Mansfield.

THE COURT: Objection sustained.

BY MR. FAHEY:

Q. During the time period that you met with Special Agent Mansfield, if it was approximately two weeks before you got out of the hospital, or whenever it was, did he ask you who assaulted you?

A. That is affirmative.

Q. Did you tell him?

A. Yes, I did.

Q. And who did you tell him assaulted you?

A. Owens.

Q. Was there any doubt in your mind when you told him that?

A. No.

Q. Did you tell him what Owens used when he assaulted you?

A. I am sorry, didn't hear you.

Q. Did you tell him what type of weapon was used?

MS. LEVINE: Objection, your Honor. That is hearsay, and is not covered under 801.

[2-96] THE COURT: Objection overruled.

BY MR. FAHEY:

Q. Did you tell Tom Mansfield what weapon was used to hit you on the head and the arm?

A. I don't remember if I told him or not.

Q. Did you describe the events in the TV room as best you could recall them that day?

A. As to what I told Mr. Mansfield that day, it is very vivid in my mind.

Out of all the people I am supposed to have seen, including my wife, I don't remember. I remember him vividly because he asked me how it happened, you know.

Q. Did you tell him?

A. Yes, and I told him that after I was hit I looked down and saw the blood on the floor, and jammed my finger into Owens' chest, and said, "That's enough of that," and hit my alarm button.

Q. And that is what you told Tom Mansfield?

A. That is what I remember I told Mr. Mansfield that day.

Q. When you told him that before you got out of the hospital, was there any doubt in your mind that that is what happened?

A. As far as that day is concerned, no.

Q. Now, when Mr. Mansfield was interviewing you before you got out of the hospital, did he show you some pictures [2-97] and ask you to pick out the person who assaulted you?

A. That's affirmative.

MR. FAHEY: May Government's Exhibit 16 be placed before the witness?

THE CLERK: Government 16, previously marked, placed before the witness.

BY MR. FAHEY:

Q. Now, was this the photograph shown you by Tom Mansfield as the person who hit you?

A. Yes, sir, that is affirmative.

Q. Did you pick out the person who assaulted you?

A. Owens, No. 2.

Q. You are pointing to Owens no.

Is that right?

A. That's right.

Q. You can set that aside.

Since the day of the assault about a year and a half ago, John, have you told anybody at any time that anyone other than Owens assaulted you?

A. Negative.

Q. Now, you are presently on Workmen's Compensation.

Is that correct?

A. That is affirmative.

Q. After you got out of the hospital about a month after the attack, did you have to go back for any other operations [2-98] or surgery?

A. Yes. I had to go back for my arm to get the plate out of my arm, but it was quite a bit more than a month. I don't know how long it was.

Probably six or seven months later that I was getting pains in my right arm.

Q. In your left arm or your right arm?

A. Right here (indicating the left arm). The left, I'm sorry.

The doctor took a picture and said that the screws were loose, so he took the plate out.

Q. Are any more operations planned for you at this time?

MS. LEVINE: Objection, irrelevant, your Honor.

THE COURT: Overruled.

THE WITNESS: Yes, I've been told by Dr. Butterfield, the neurologist, my neurologist that put me back together, he said to have a cat scan every six months because I have two enlarged ventricles in my head up there somewheres, and they are going to keep enlarging.

And he said that is what is causing my dizziness to increase, my hearing to decrease, and my left eye has changed from 20/20 with glasses to 20/30.

And he said that will keep increasing, too. And when it gets to the point where it is too bad, too hard to put up with, at that time I'll have to have brain [2-99] surgery.

I don't know if you call it brain surgery, but it is drilling a hole and tapping out the pressures.

MR. FAHEY: I have no further questions, your Honor.

THE COURT: Any cross?

MS. LEVINE: Yes.

CROSS-EXAMINATION

BY MS. LEVINE:

Q. Let's go back to the morning of April 12th, 1982, Mr. Foster.

You testified that you went from range to range opening the cells. Right?

A. Sorry. You are not coming through.

Q. Okay. I'll try to keep my voice up, and you let me know if you need any help. Okay?

A. Right.

Q. On April 12th, 1982, you went from range to range opening the cells. Right?

A. Yes.

Q. So you opened only the occupied cells. Right?

A. That is affirmative.

Q. So if a cell wasn't occupied, it wasn't opened on April 12th, 1982.

Is that right?

[2-100] A. As far as I can remember our system.

Q. Now, you described your injuries on direct examination. They are primarily on the left side.

Right?

A. That is affirmative.

Q. And you stated that you broke your middle finger. Right?

A. That is affirmative.

Q. That was broken by jamming it into the chest of the individual. Right?

A. That is affirmative.

(Brief pause)

Q. Now, as you walked up and down these tiers opening the cells, did you see any inmates?

A. Well, first of all, you only go to the end of the tiers where the lockboxes are, and I saw any number, but I don't know who.

I mean, it was just routine.

Q. Did you speak with anybody?

A. I am sure I did, but I don't remember now.

Q. Now, you testified when you were in the TV room, the next thing you recall was being hit. Right?

A. That is affirmative.

Q. And you don't recall seeing your assailant. Right?

A. At this time I don't remember.

[2-101] Q. But you do recall seeing blood on the floor. Right?

A. That was the last thing that I can actually remember.

Q. And you pushed your alarm button before you actually saw the blood. Right?

A. No, not before the blood.

Q. About the same time?

A. I beg your pardon?

Q. About the same time you saw the blood, and then you pushed your alarm button?

A. I don't know. I can't remember.

Q. Okay.

Now, you identified Mr. Owens-El in court today. Is that right?

A. That is affirmative.

Q. And you saw him every day when you were working. Right?

A. That is affirmative.

Q. And you were working five days a week?

A. That is affirmative.

Q. So it is not unusual or unnatural for you to recognize him, is it?

A. No.

Q. You were his counselor in J Unit. Is that right?

A. That is affirmative.

Q. And you got along with him pretty well; is that right?

[2-102] A. I thought I got along with everybody.

Q. You placed some telephone calls for him?

A. That is affirmative.

Q. Now, after you were hit, you went to the hospital.

A. That is what they tell me.

Q. You were in the hospital for four weeks?

A. Approximately.

Q. While you were in the hospital, you made some statements. Right?

A. The only statement that I remember I made was to Mr. Mansfield, and that is vivid.

Q. Well, let me show you some statements and see if you can recall them. Okay?

MR. FAHEY: Can we have an offer to be sure what statements we are talking about.

BY MS. LEVINE:

Q. You were in the hospital on April 12th, 1982. Right?

A. That is affirmative.

Q. And there were hospital personnel around?

A. Must have been. I don't remember anything.

Q. But it was run to your knowledge like a regular hospital; right?

A. That is affirmative.

Q. And to your knowledge, regular records were taken. Right?

[2-103] A. I am sure they were.

MS. LEVINE: May I approach the clerk, your Honor?

MR. FAHEY: Your Honor, I'd like to see the document that counsel is referring to.

MS. LEVINE: For the record, I have given counsel copies of all of these documents.

THE COURT: Fine.

MR. FAHEY: Your Honor, I'd like to be heard at side bar if she is going to place these before the witness.

THE COURT: All right. Come on up to side bar.

(At side bar on the record:)

THE COURT: What do you want to do, refresh his recollection or what?

MS. LEVINE: I have three statements that he made in the hospital. One where it says—where he denies knowing any assailant, and the other says that one of these clowns must have done it, but denies knowing anybody, and the third says that Leo did it to me.

THE COURT: Are those part of the hospital records?

MS. LEVINE: Yes.

MR. FAHEY: If I may be heard briefly, these statements are by the people who attended him in the hospital, and there is no indication that these are [2-104] statements of the witness.

MS. LEVINE: If I may show the Court the other statements as well, they are verbatim with quote marks.

MR. FAHEY: Dr. Butterfield will be testifying, and we can do it with Butterfield.

MS. LEVINE: But this witness testified—

THE COURT: I think she should be entitled to go this far.

Show the witness the statements, and ask him to read it. Then you may ask if it refreshes his recollection that he made a statement like that at the hospital. If he says no, that is the end of it.

In other words, you can't get it in through him.

Give the clerk what you want to have marked.

(Counsel complies)

(End of side bar conference)

MS. LEVINE: May I ask that that be marked as Defendant's next in order?

THE COURT: We will mark that as Defenndant's 56.

MS. LEVINE: May I ask that that be placed before Mr. Foster.

MR. FAHEY: Your Honor, can I indicate to Mr. Foster that there is some water to his left if he needs it?

THE COURT: That's fine.

[2-105] MR. FAHEY: Do you want some water?

THE WITNESS: Thank you.

THE CLERK: Defendant's Exhibit 56 marked for identification, and placed before the witness.

(Defendant's Exhibit 56 marked.)

BY MS. LEVINE:

Q. Mr. Foster, please to yourself read the first three lines of that page.

A. (Witness complies)

THE COURT: Go ahead and ask your question, Ms. Levine.

BY MS. LEVINE:

Q. Mr. Foster, does that reflect a statement that was made on April 12th, 1982?

A. You mean where it says "hurts"?

Q. Does that entire line, beginning at "hurts," refresh your recollection as to any statement you made that day?

A. That's right. I don't remember any statement but the one I made to Mr. Mansfield.

Q. So this doesn't refresh your recollection as to what you might have said that day?

A. To Mr. Mansfield?

Q. No, on April 12th, this would have been in the hospital.

A. No, I don't remember any of that.

MS. LEVINE: May I have a moment, your Honor? [2-106] I am having problems getting my papers straight.

THE COURT: Yes, you may.

(Brief pause)

MS. LEVINE: May I approach the clerk again with some exhibits, and I will lay a foundation once I have approached the clerk.

THE COURT: You may.

(Counsel conferring with the clerk.)

BY MS. LEVINE:

Q. Mr. Foster, you were in the hospital, to your knowledge, on April 15th, 1982.

Is that right?

A. That is affirmative.

Q. And you were under doctor's care there?

A. I'm sure I was.

Q. And nurses' care. Right?

A. I am sure I was.

Q. And you can't recall at this point making any statements that day. Right?

A. You are right.

Q. Will you please look at Exhibit 57, which is before you, dated 4-15-82 on the top— "24 DOT Cricital Care Flow Sheet"—and turn to the third page, the last page of that exhibit, please.

THE CLERK: Defendant's exhibits 57 and 58, [2-107] marked for identification, are placed before the witness.

(Defendant's Exhibits 57 and 58 marked.)

BY MS. LEVINE:

Q. Now, at the last page look to the left-hand column where it says 2:30 p.m. or 2:30 p. [sic], and look across from that, something beginning with quotation marks, and read that to yourself.

A. (Witness complies)

Q. Does that refresh your recollection as to this statement that you made that day?

A. No.

THE COURT: Your answer is no?

THE WITNESS: The answer is no, sir.

BY MS. LEVINE:

Q. Please look at Exhibit 58 before you.

A. (Witness complies)

Q. You were in the hospital on 4-16-82. Right?

A. Right.

Q. And you were under nurses' care; right?

A. That's affirmative.

Q. Please turn to the third page of that statement and go right below 8A.

A. (Witness complies)

MS. LEVINE: Your Honor, may we approach for a moment?

[2-108] THE COURT: All right.

(At side bar on the record:)

MS. LEVINE: I want to show the Court what I am talking about. Right here it says "Who slugged me? Was it Leo?"

It is a very specific prior inconsistent statement with his statement to Agent Mansfield about identifications, and I know I can get this submitted thorugh the doctors as a medical record, but I would like to be able to specifically ask him to discuss this statement about "It was Leo." And, as I understand the Court's last ruling, I was supposed to ask him a specific question in order to be able to do that.

THE COURT: Whose notes are these?

MS. LEVINE: Nurses' notes, but they are kept in the regular course of business in the hospital.

MR. FAHEY: I have never seen these before.

MS. LEVINE: I gave you a copy of it prior to—

THE COURT: Just a minute. Somebody is calling the treating physician in the case.

MR. FAHEY: I am, but not the nurse. I don't know who made these notes. Moreover, he has never seen these before, and I would indicate that it will not refresh his recollection.

I think the appropriate person to call is the [2-109] person who made the entry.

MS. LEVINE: These are obviously hospital business records.

THE COURT: What do you want to do? Do you want to ask him if he made the specific statement in quotes?

MS. LEVINE: Yes, your Honor.

THE COURT: I am going to permit that.

(End of side bar conference)

BY MS. LEVINE:

Q. Mr. Foster, around 8A, to the right of that, you will see an 8A. There are two blocks, the block that says 8A and a block underneath it with no writing at all in that block underneath it.

Go direct across to that block. Okay?

A. All right.

Q. And read to yourself that first sentence.

A. (Witness complies)

Q. Now, does that refresh your recollection, Mr. Foster, as to the statement made that day— "Who slugged me? Was it Leo?"

A. I don't remember. I don't even remember Leo.

Q. You don't remember a Leo in the Unit?

A. I don't know.

Q. Wasn't there a man named Leo Damello living in the J Unit at that time?

[2-110] A. I remember the last name, but I don't remember a Leo.

There was a Damello there.

Q. Now, you stated that you remember very little from being in the hospital. Right?

A. I am sorry, I didn't hear you.

Q. You stated you remembered very little from being in the hospital. Right?

A. That is affirmative.

Q. I apologize for not keeping up my voice.

With respect to the visit from Mr. Mansfield, you don't remember who came to visit you while you were there. Right?

A. Not until about the last day.

Q. Now with respect to other visitors, you don't remember that. Right?

A. Say that again, please.

Q. You testified on direct that a lot of people told you they came to visit you. Right?

A. Right.

Q. A lot of people.

A. A lot of people told me they were there. My wife told me about that, but I don't remember seeing them.

Q. In fact, you don't remember what they did when they were there. Right?

A. No.

[2-111] Q. You don't remember if they said anything to you?

A. Only Mr. Mansfield is the only one I can remember.

Q. You don't remember if any of the witnesses came in and said, "Owens did it, didn't he"?

A. No.

Q. Now, you testified that you recalled making a statement to Special Agent Mansfield.

Right?

A. I made the statement to Mr. Mansfield.

Q. And you recalled meeting with Agent Mansfield, didn't you?

A. In the—at the hospital, yes.

Q. Do you recall meeting with him only once?

A. That is the only time I remember.

Q. You don't recall meeting with him on April 19th, I believe it was?

A. I don't know what the date was when I did see him when I gave him my impressions or my statement as to who had done it and . . .

Q. Since you have been released from the hospital, you have seen Agent Mansfield, haven't you?

A. A few times.

Q. And you have spoken with him about your statement of that date.

Is that right?

[2-112] A. I assume I did. My memory is not good, that good to remember everything.

Q. Were you given a chance to re-read that statement?

A. To re-read it?

Q. Yes.

A. I am sure I was.

Q. Did he show you any earlier statement you may have made to him?

A. Not Mr. Mansfield, not that I can remember.

Q. Now, when you testified, you made a statement to Agent Mansfield about your assailant's identity, and you don't recall now why you made that statement, do you?

A. No, but it was very vivid in my mind at that time.

Q. Making the statement is vivid in your mind? Right?

A. Yes.

Q. The assault itself is not as vivid. Right?

A. That is affirmative.

Q. And you were in the hospital on April 19, 1982, weren't you?

A. Yes, I was.

Q. And you don't recall making a statement that day. Right?

A. Negative.

MS. LEVINE: May I approach the clerk, your Honor?

THE COURT: You may.

[2-113] (Brief pause)

THE COURT: Do you want this placed before the witness?

MS. LEVINE: Yes, please, your Honor.

THE COURT: Go ahead.

THE CLERK: Defendant's Exhibit 59 marked for identification, and placed before the witness.

(Defendant's Exhibit 59 marked.)

BY MS. LEVINE:

Q. Mr. Foster, read to yourself the third paragraph of this statement.

A. (Witness complies)

Q. Does this refresh your recollection about meeting Agent Mansfield on April 19, 1982?

A. Most of it, yes.

Q. And on that date, you weren't able to identify your assailant, were you?

A. On April 12th?

Q. April 19th, 1982.

A. This was Mr. Mansfield's statement and—

I remember telling him who it was.

Q. On April 19th, however, according to this statement, you said that you could not remember the inmate's name. Right?

A. I don't remember that at all.

[2-114] Q. Do you remember saying you felt the inmate's name rhymed with "coma"?

A. I don't remember it.

Q. Now, you made another statement to Agent Mansfield. Right?

That is the one you testified to on direct examination.

A. Right.

Q. This is the statement where, although you can't remember why you named James Owens as the assailant. Right?

MR. FAHEY: Objection, mischaracterizes the witness' testimony.

THE COURT: The objection is sustained.

BY MS. LEVINE:

Q. At this moment you can't remember why you named Mr. Owens as your assailant. Right?

A. Only that it was so vivid in my mind when I had given the information to Mr. Mansfield.

Q. But you don't know what you base that on, do you?

A. My memory doesn't help me to remember why I remembered it at that time.

Q. You don't know if you based it on statements that somebody may have made to you?

A. No.

Q. Now, at the time you made the statement to [2-115] Mr. Mansfield, the one you made two weeks before you were leaving the hospital, you were still in the hospital. Right?

A. Right.

Q. And you were still in a state where you could not remember whether your family or friends were coming to visit you.

Right?

A. That's affirmative.

Q. And in the statement you told Agent Mansfield you thought you were hit six times on the head. Right?

A. I see it here, but I don't remember saying it six times.

Q. Okay. This is a different statement, if I may approach the witness.

THE COURT: Yes, you may.

THE CLERK: Government's Exhibit 60 marked for identification and placed before the witness.

(Defendant's Exhibit 60 marked.)

BY MS. LEVINE:

Q. Mr. Foster, please look at the bottom of the first page and read beginning with the second to the last line of the page, "He's aware"—read to yourself, continuing to the first line on the next page.

A. (Witness complies)

[2-116] All right.

Q. Now, Mr. Foster, didn't this refresh—does this refresh your recollection as to what you said to Agent Mansfield the day where everything is so vivid in your mind?

A. It refreshes my vivid statement that I gave to Mr. Mansfield at that time.

Q. And you said that you felt you were hit six times on the head. Right?

A. That I don't remember.

Q. Do you remember saying that you saw six drops of blood on the ground?

A. That was the last thing that I physically remember was seeing the blood on the floor.

Q. Now in your statement of May of 1982 and in your testimony today, you said that you thought like what hit you was a pipe.

Right.

A. Right.

Q. And the reason you felt that was what hit you was because the thing that hit you had a metallic sound on your head?

A. Yes. Like I say, I don't remember any of that. All I physically remember is seeing the blood on the floor.

Q. So really all you remember physically at that point [2-117] is being hit, seeing the blood on the floor, and that's it?

A. That's it.

Q. You don't remember seeing your assailant?

A No, not at this time.

I might have remembered it at the time I was talking to Mr. Mansfield.

Q. And you might not have. Right?

A. I can't say. My memory is not that good.

Q. So you could have based your statement to Mr. Mansfield on something else.

Right?

A. I doubt it.

Q. You could have.

MR. FAHEY: Objection. Argumentative, your Honor.

THE COURT: Sustained.

BY MS. LEVINE:

Q. You don't know why you made that statement, do you?

MR. FAHEY: Objection, asked and answered—argumentative.

THE COURT: Sustained.

MS. LEVINE: May I have a moment?

THE COURT: Well, why not do this. Let's take our noon recess at this time.

MS. LEVINE: That's fine.

[2-128] CROSS-EXAMINATION (Resumed)

BY MS. LEVINE:

Q. Mr. Foster, you tesitified that you operated as the correctional counselor for J Unit.

Right?

A. I operated as the what?

Q. You were the correctional counselor in J Unit.

A. Yes, that is affirmative.

Q. You were also the correctional officer or active as the correctional officer at some time?

[2-129] A. Right—two and a half days a week.

Q. In those positions, you were responsible for how the unit was run; isn't that correct?

A. That is affirmative.

Q. And you were responsible when certain things were done in the unit. Right?

A. That is affirmative.

Q. And there was one washing machine and dryer in J Unit.

Is that right?

A. That's right.

Q. And they are located on the first tier?

A. Of B range.

Q. In the flats?

A. Right.

Q. And the washer and dryer are available for use by the inmates.

Is that right?

A. That is affirmative.

Q. And at some time in May of 1982, there was a memo circulated about the washer and dryer.

Is that right?

A. That's affirmative.

Q. And it was sent by you.

A. That's affirmative.

Q. And it indicated that the washer and dryer were not [2-130] to be used until 7:30 a.m.

A. 8 o'clock, but there was a reason for it, though.

Q. But it indicated that they were not to be used until 8 o'clock?

A. Negative. 7 o'clock, but there was a reason for it, though.

Q. But it did indicate that they were not to be used until 7:00 a.m.?

A. That is affirmative.

MS. LEVINE: Nothing further?

THE COURT: Any redirect?

MR. FAHEY: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. FAHEY:

Q. John, what was the reason that memo was circulated a few months before April of '82?

A. The inmates that lived within the first four cells near the washing machine complained about the noise in the morning before 7 o'clock.

Q. Did there ever come a time, however, even after the memo was circulated, that some inmates used the washer and dryer?

A. Oh, yeah. When other officers were on, maybe some didn't follow the memo.

MR. FAHEY: Nothing further.

[2-131] THE COURT: Ms. Levine, anything else?

MS. LEVINE: No, your Honor.

THE COURT: May this witness be excused?

MR. FAHEY: Yes, your Honor.

MS. LEVINE: Yes, your Honor.

THE COURT: All right. Mr. Foster, you may step down. You are excused. Thank you very much, sir.

(Witness excused)

* * * *

[2-132] [Testimony of James Boyce Butterfield]

DIRECT EXAMINATION

BY MR. FAHEY:

Q. Mr. Butterfield, what is your profession, sir?

A. I'm a neurosurgeon.

* * * *

[2-133] Q. Doctor, I want to direct your attention to April 12, 1982. Were you on call that day for the Santa Maria area—that is the Marion Hospital?

A. That's correct.

Q. And did a particular emergency case come in with head injuries?

A. Yes.

Q. And who was that case?

A. That was Mr. John Foster.

Q. When John Foster was first brought into the hospital, what particular head injuries did you see him to have suffered?

A. I was called to the emergency room by the emergency room physician, and when I first saw Mr. Foster, he had [2-134] evidence of multiple lacerations about his scalp, on the left side of his scalp, about like so (indicating); he had a swelling of the left eye such that it was swollen shut.

He had swelling of his left cheekbone, indicating an underlying fracture, and he was quite lethargic. He would prefer lying there with his eyes closed than actually have his eyes open.

However, he did know his name, and did not know where he was or the date.

To simple questions that we needed to know, such as myself as a neurosurgeon if I had to operate, such as did he have a pain in the neck, and he would say, "No," and a simple command such as "Squeeze my right hand," he would do it.

Q. Did he have any injuries to the area around his ear?

A. Yes.

Q. Could you describe those?

A. Yes.

He had a full thickness, which means it goes through the skin as well as the cartilage of the left ear in the upper aspect of it.

Q. Was his condition at that time considered very serious?

A. Yes. I think we need to know that any head injury, certainly one that makes someone lethargic, is very serious, [2-135] even up to months and years after that particular injury.

And certainly when I first saw him I had to work on the hypotheses that this was a very serious injury.

Q. In your experience, Doctor, as a neurosurgeon, have you seen similar types of injuries?

A. Yes.

Q. Can you describe the type of injury that you saw?

A. Well, with the head injury, I think we have to add that there was also a swelling in the upper aspect of his left forearm, as well as swelling in his right long finger.

And trauma is what the neurosurgeon sees the most of, trauma being accidents for the most part.

The only thing that I have seen coming close to this is a high-speed vehicle accident or possibly, as many of you may know, Vandenberg Air Force Base is building for the shuttle of 1985, and have several platforms there that stand up to two to three stories, and we have had need to treat patients falling two to three stories.

So I would say this type of multiple injuries would be most akin to something where someone has fallen two to three floors, or having been in a high-speed motor vehicle accident.

Q. Now, Doctor, assuming for the sake of the hypothetical, that a pipe had been used to hit John Foster in the arm, the hand and in the head, how many blows approximately [2-136] as a neurosurgeon would you have estimated that he received?

A. Be most concerned with the head—because this is obviously the area where life or death is usually most critical of all, the brain being so sensitive—certainly around the head, which includes, of course, the face as well as the skull, which is made out of bone, as you are aware, I would estimate there had to be at least five such blows if this indeed was caused by a blunt instrument.

Q. And that is apart from—

A. Apart from blows to his arm or elsewhere in his body, that's correct.

Q. Doctor, what is John's blood type?

A. John's blood type is A.

Q. Now, was surgery performed on John on the day he was brought into the hospital, that is April 12?

A. That's correct.

Q. And can you describe that surgery, please

A. Yes.

The patient underwent surgery on the day he came in the hospital, several hours after he hit our emergency room, and he was closely observed by myself during that particular time.

In the first place, the x-rays did reveal he received what we call a depressed skull fracture, which [2-137] means that not only was there a break in the bone, but the bone was shoved in, compressing the brain itself.

So that had to be elevated or removed to relieve the pressure on the brain.

Extensive laceration, as I mentioned, extensive not only to the left but also in terms of the fact that there were some dead tissue evidenced underneath this particular laceration.

Q. Are you still talking about the head laceration?

A. That's correct.

So you need to know that you have to remove this dead tissue, because otherwise this will act as a source of infection, and of course, even with that precaution, that occurs.

So he had to have that depressed skull fracture raised.

As it turned out, he had a blood clot between the covering of the brain, which we call the dura. He had a blood clot on that particular dura, and he had the depressed fracture which we removed and elevated, and

had extensive lacerations, including the lacerations to the ear which needed closing at that particular point in time.

Q. Now, after this surgery on his brain was performed, Doctor, had the pressure or some of the pressure on his brain been reduced?

[2-138] A. Yes.

I should add the other part of the operation which we did—which I did actually—is to put a monitor in. What this is actually is a simple closed system that measures the pressure.

You put it in between the bone and the brain—obviously not in the area of the trauma, but in the area up front.

This measures the pressure and tells us what the pressure is inside the brain, and if it is very high sometimes, we have to do something about it; and if it is very low, we just continue to observe the patient.

This is just another thing that we use to follow the patient to see if he is getting better or worse, and that indicates our treatment.

So we did have a monitor put in at that time, also.

Q. Doctor, you also mentioned that John suffered from injuries to his arm and hand.

Was surgery also required for those two areas?

A. Yes. He had pins put in his left arm, forearm in the upper aspect on the 26th of that month, which was 12 days after his admission.

And he had reduction of the right long finger of his right hand. That was reduced during the same [2-139] hospitalization, and that was on the 23rd of April of 1983—or '82.

Q. You used the term, Doctor, "upper aspect."

Is that near the elbow in the left arm?

A. Yes, that's correct.

That is a very crucial area because that is more crucial because any joint is more crucial than any place between

joints.

* * * *

[2-142] Q. Doctor, looking at the x-ray of John Foster's skull, can you describe the particular injuries that that x-ray reveals.

A. Yes. These are the orbits as you can see (indicating).

Q. The orbits of the eye?

A. That's correct.

And right here (indicating) there is a fracture on the inferior aspect of the rim.

Q. What does that mean in laymen's terms?

A. In laymen's terms it means there is a break there which may or may not give him double vision.

It would have to be treated later on.

Q. Is that in the right eye?

[2-143] A. That is the left eye. This is your cheekbone right here (indicating).

And the reason this is so very cloudy, there is blood in there in that sinus because this happens to be underneath the cheekbone, and this is reflective of the fact that he had a fracture there, as well.

Q. Does it show any fractures of the upper skull area?

A. No. Actually the CT scan helped us a lot more than that.

It was depressed, and we knew that he had a fracture to begin with.

There is some evidence of a fracture right there (indicating), right there in the middle line. But actually the fracture was not only palpable by your finger—of course, putting a glove on the finger first—but also on the CAT scan it was demonstrated.

Q. By "palpable" meaning what?

A. You could feel it. You could feel it with your finger, putting a glove on first to confirm it, and you could feel it

shoved in.

* * * *

[2-146] The day following his surgery on April 13th, what was John's condition at that time?

Q. I think it is important to point out that everything in terms of whether he is better or worse is actually predicated or based on how he was when I first saw him.

So if I say he is doing better, that is better [2-147] than when I first saw him in the emergency room.

At that time he was very lethargic, answered to name only, and responded only to simple commands.

So therefore, the day following the surgery—

MS. GOMEZ: Your Honor, may we know what the doctor is referring to—what documents?

MR. FAHEY: Your Honor, these are part of John Foster's medical file which counsel obtained through the 17(c) subpoena and provided a copy to me as a matter of fact.

Those are the doctor's.

THE COURT: Let's ask the doctor.

Is that what you are referring to, sir?

THE WITNESS: Yes, sir, that's correct.

I saw him several times on the day of the surgery. In fact, I spent the whole day with the patient.

But the following day, which is specifically on April 13th of '82, I mentioned the fact that he is gradually waking up.

BY MR. FAHEY:

Q. What does that mean, Doctor, in terms of ability to communicate and remembering things?

A. Almost all head injuries go through a reasonable standard type of recovery if they are indeed to recover.

And, needless to say, there are cases that don't [2-148] recover. But they gradually start waking up, and as they start waking up, they usually have islands of memory which may or may not have any pertinence.

For example, I am sure you all heard, "The last thing I heard was the screeching and screaming of the brakes."

This is usually the way with television shows and perhaps from books you have read.

The problem is the last thing a person remembers is often what has the most impact on you; namely, without being facetious, what happened just before the accident or what caused the problem to occur.

So that obviously is a very vivid memory, and the brain tries to process that as best it can.

And the brain is I think in this relationship important to consider the brain as somewhat of a computer. It is even far more sophisticated.

So, at any rate, when I say gradually waking up, he was more awake than asleep. He was not lethargic all the time in terms of keeping his eyes closed all the time.

It mentions that he still has some weakness on the left side of the body, wasn't moving his left leg or left arm, which would suggest some brain damage on the right side.

At that point in time we noted the fracture of [2-149] the upper aspect of the forearm and an orthopedic doctor was called, and essentially he had shown some signs of improvement.

* * * *

[2-153] Q. Let's go on to April 17th, sir.

What was John's condition like the next day, April 17th?

A. Well, the—the record reflects the fact that the patient wanted to go home, which was certainly appropriate.

He did mention that he remembered being assaulted.

Q. Did you ask him who assaulted him on that day?

A. No.

In situations like this—In fact, the only time I ever asked him specifically if he remembered it was when he

first came to the emergency room, and bear in mind this is before surgery.

And since someone mentioned to me that this had happened in terms of an assault, I would ask him if he remembers who hit him.

The reason I did that is the same reason I ask most patients where they worked.

If indeed his brain was working at that degree of sophistication, the fact that he didn't remember told [2-154] me something about the fact that when he only told me his name, that was consistent with the fact that he had a moderate head injury, not a severe one.

So I only asked him where he worked, and I figured in terms of liability this is really up to other people to determine other than myself.

Usually I have my hands full in treating such patients.

* * * *

[2-157] Q. Doctor, can you explain to the jury how increases in brain pressure can affect one's memory?

[2-158] MS. GOMEZ: Objection, relevance, your Honor.

MR. FAHEY: I think that is clearly the issue in this case, your Honor.

THE COURT: The objection is overruled.

BY MR. FAHEY:

Q. Can you explain that, please, Doctor?

A. Well, I mentioned to you earlier that the brain is a very sophisticated computer and certainly the higher the functions go, as for example, memory, they are the first ones to be tampered with when things such as a blood clot, for example, pressure on the brain, such as a depressed skull fracture like he had, Mr. Foster, when he first came into the hospital—anything that creates fluid that sits in the ventricles.

One of the first things this would affect would be the memory, and treatment of that particular condition—just like he remembered more the day after surgery than he remembered the night before or the day before—the few hours when I was observing him prior to having the first operation.

The reason he got better was we relieved pressure for him. So pressure has a great deal to do with not only specific things, such as moving the body from one side to the other, but also in general.

But, more importantly, as to memory. So as it [2-159] gets more and more away from a particular event, as the pressure is relieved more and more, his memory for anything realistically would be more apt to be reliable than right when pressure was acting.

Be this right after the injury or perhaps even a year or so later.

* * * *

[2-160] My first visit with him as an outpatient was on May 28th, 1982.

Q. What was his condition on that date?

A. At that time I made note of the fact in my own hand that his memory was still fuzzy, but told me he recalled [2-161] his assailant.

Q. Did you ask him who it was?

A. No, I didn't.

Q. Were you concerned about who may have assaulted him at that time?

A. No.

* * * *

[2-167] BY MR. FAHEY:

Q. Did you ever discuss this aspect with John Foster?

A. The last time he was in the office, in fact, which was November 3rd, 1983, he mentioned the fact that he was

[2-168] having trouble concentrating, and so in other words, he had more symptoms with regard to memory, and he states at that particular time that he only recalled what he told—I believe it was an FBI agent—in regard to the assault as far as going into the TV room at 6 a.m. on the date of the injury.

He states that he was anxious about being able to remember the right thing at the time of the trial, and I had to again give him the discussion that I already mentioned, because I'm as honest with him as I am with you.

And that is that stress to him, if he worried about being able to remember, for sure he would be able to remember less for the reasons I explained; whereas, most of us make it more efficient.

But for someone perking along on six, that makes you less efficient.

So I told him as best I could not to worry about memory. There was nothing he could do about it, especially after the CT scan, but especially that it would be counterproductive for him to worry about it and would make him less efficient indeed if he had this particular memory still retainable.

In other words, he could recapitulate what happened.

* * * *

[CROSS-EXAMINATION]

* * * *

[2-175] Excuse me. When Mr. Foster arrived at the hospital, you questioned him regarding his attack. Right?

A. Yes.

Q. And he told you that he did not know who his assailant had been.

Is that correct?

A. That's correct.

Q. And at that time he was confused and disoriented. Correct?

A. Perhaps more importantly lethargic. That's true.

Q. Would you also say that he was confused?

A. Yes. He only remembered his name, as I indicated.

Q. On April the 15th he was still confused, wasn't he?

A. As far as lack of confusion, which I presume you mean is appropriate, he was not perfectly lucid.

The date you mentiond was the 15th?

Q. Yes. April the 15th.

A. No. He was still disoriented, that's right—at least at the time I saw him, as I indicated, this being an intermittent thing.

MS. GOMEZ: I would like for Exhibit 57 to be [2-176] placed before the witness.

THE CLERK: Exhibit 57 placed before the witness, previously marked.

BY MS. GOMEZ:

Q. Dr. Butterfield, have you ever seen this excerpt before?

A. You mean since the patient was discharged from the hospital?

Q. At any time.

A. Yes. We usually see them when he is in the hospital.

Q. Is this part of Mr. Foster's medical record?

Is that right?

A. That's right.

Q. This is entitled "Critical Care Flow Sheet."

Is that correct?

A. Yes.

Q. Now, this chart is prepared in the regular course of business at the hospital, is it not?

A. If they are in Intensive Care, yes.

Q. And the notations in here are written down at or near the time indicated, are they not?

A. Yes.

Q. And they are prepared by someone who has knowledge of what they are putting down there. Correct?

A. Well, would you qualify that?

[2-177] Q. Yes.

Whoever is jotting down the information from the critical care flow sheet is someone who is putting information down there.

You would not have someone coming up and jotting down something they don't know what they are doing, would you?

A. No. But they may well be nurses who never handled head injury patients.

Q. So it could be a nurse, it could be a doctor?

A. No. It could not be a doctor. My notes I already read from.

Q. All right. But normally I am saying that it could be a doctor or it could be a nurse. Right?

A. No. These are nurses' forms.

Q. And this would be a nurse who was working at Marion Hospital.

Is that correct?

A. That's right.

Q. And it is a practice of the hospital to keep these type of records, is it not?

A. Yes. It's not a rule really, but it is one method we use to try to keep some continuity.

Q. Were you with Mr. Foster, if you can tell from this record, on April the 15th at 2:30 p.m.?

[2-178] A. You are discussing the—

Let's see. Looking at my notes which, of course, are the notes that I have to go by, my own observations, at 2 o'clock in the afternoon on that day, you mean?

Q. 2:30, yes.

A. Are you asking me to read what the nurse said?

Q. No. I was asking you if you were present with Mr. Foster.

A. At 2:30, no.

The notes indicate that I was there at 2 o'clock. How long it took to evaluate him, whether it took half an hour or not, I'm not sure.

Q. When you were with Mr. Foster, do you recall him making a statement saying that one of those clowns must have hit me. They are not very nice out there, you know?

A. No.

Q. Do you remember Mr. Foster making that statement?

A. No.

Q. Looking at Exhibit 57 where the notation is 2:30 p.m., that indicates that Mr. Foster said that, does it not?

A. I wouldn't be able to comment on the veracity of this because I don't know who it is that wrote it.

Q. But the record does indicate that. Is that not true?

A. Yes. The nurse made a notation of the fact, yes.

Q. Now you testified that Mr. Foster was not delusional [2-179] during the time he was in the hospital.

Correct?

A. Yes, that's true.

Q. But there were certain things that he was not very certain about. Right.

A. If you could clarify that.

Q. Yes.

Specifically, he kept thinking he was going home every day with his wife, didn't he?

A. He wanted to go home, which I thought was very realistic.

Q. You thought that it was what?

A. Very realistic.

Q. To go home?

A. Oh, certainly.

Q. Even though you felt that he needed several surgeries performed?

A. At that time I didn't know about the second brain operation that would be necessary.

But certainly when we look at a patient, this is being a very good sign.

Q. When you saw Mr. Foster on several occasions, you indicated that he wanted to know where his wife was, that she was supposed to bring his clothes to him and to bring him home, didn't you?

[2-180] A. My notes indicate that he did not mention that to me.

He indicated that he was anxious to go home, but not that particular day.

MS. GOMEZ: I'd like Exhibit 58 placed before the witness.

THE CLERK: Defendant's Exhibit 58 placed before the witness, previously identified.

BY MS. GOMEZ:

Q. Were you present with Mr. Foster on April the 16th at 8:00 a.m.?

A. Well, I was present at 2:00 p.m. That is when I made my note.

Sometimes, obviously, when they are in Intensive Care I see them more than once.

Q. Looking at Exhibit 58, will you tell us whether or not this is entitled Critical Care Flow Sheet?

A. Yes.

Q. And this is the same as the previous exhibit, is it not?

A. It's filled out by a nurse.

That's correct.

Q. And this is also a record kept by Marion Hospital. Correct?

A. Yes.

[2-181] Q. And looking at the last page, there are some notes by a nurse. Correct?

A. That's true.

Q. And right next to 8:00 a.m., is it not true that the nurse indicated that Mr. Foster has said, "Who slugged me. Was it Leo?"

A. That's what is mentioned here.

I couldn't comment on the veracity or truth of it.

Q. That is what is written on that report. Correct?

A. That is what is written down.

Q. On April 22nd, you noted in your medical records that Mr. Foster still remained confused.

Is that not true?

A. That's true. At that particular time on that particular day he was confused.

That's true.

* * * *

[2-188]Q. When Mr. Foster told you that he recalled the identity of his assailant, you did not ask him who the assailant or assailants had been, did you?

A. That's correct.

[2-189] Q. The reason you did not do so is because you felt that as a doctor you did not have an obligation to ask.

Correct?

A. I think it is something that you just, having treated patients with problems similar to this for many years, that you make a decision on one way or the other.

And if you don't think it is of critical importance in terms of him not being able to tell anyone else, that you have your hands full, as I say, handling a busy practice,

including Mr. Foster's complications, and you just tend to those as best you are able.

That's true.

Q. You felt that you had already complied with your obligations?

A. I thought it was important enough to mention that he could recall, true, but as far as mentioning any names or individuals, true.

I didn't feel it would be useful in terms of my obligation in treating him to know.

* * * *

[2-190] Q. You did write a letter after you examined Mr. Foster. Correct?

A. That is correct.

Q. And in that letter you indicated that in your professional opinion at that time, meaning May 28th, 1982, Mr. Foster had very little memory from the moment of the altercation and the first several weeks in the hospital.

Is that correct?

A. I think we have to—

In order to answer that, I think in a way I am sure you would want me to in terms of the honest truth, you would have to bear in mind that Mr. Foster, as well as many of my patients, are injured on the job, and when I see a patient improving or can get a feeling for how he will be a year from then, especially in terms of his being 60 years of age, to his carrier in terms of work and whatever gears this happens to get in motion for the workmen's comp carrier, such an input, even though at that time obviously what little he could remember was his assailant—since it is already mentioned four days before that he did—the fact that he may have had trouble, or would have trouble with his memory in the future, I thought it useful to the carrier, and as soon as I was aware of this I felt it was my obligation to let them know.

Q. I am not sure that I understand your testimony, [2-191] Dr. Butterfield.

Are you saying that that was not your professional opinion when you said that?

A. Well, the memory he did have, as I indicated in my notes—my handwritten note of the 28th—was the fact that he did recall who his assailant was.

The reason for the letter, which was not prompted by any questions, was that this was a workmen's compensation case. He was injured on the job.

And I was letting them know, giving them the feeling for what I now felt they should get in motion in terms of Mr. Foster having been disabled by this obvious severe injury.

So the tenor of my letter would reflect my feeling. It wouldn't tell what he did remember, but would indicate, as I have already indicated, that as he did to me, but would indicate that he was having trouble in the area of memory, and so this might obviously restrict him in regard to being able to return to work.

Q. Now, in this letter we are talking about, you did indicate, did you not, that Mr. Foster had little memory from the moment of the altercation, and the first several weeks in the hospial.

Correct?

A. Yes. I have already clarified that, though.

[2-192] Q. But you did state that in the letter?

MR. FAHEY: Objection, asked and answered twice.

THE WITNESS: I don't see how I can improve on my answer. I am sorry.

MS. GOMEZ: That question has not been answered directly, your Honor.

THE COURT: The objection is overruled.

BY MS. GOMEZ:

Q. You may answer the question, Dr. Butterfield.

Did you state that in the letter?

A. Yes.

Q. When you examined Mr. Foster on May 28th, 1982, Mr. Foster told you that he became easily confused, did he not?

A. He gets easily upset and confused.

That's correct.

Q. And you also stated that in the letter you sent. Correct?

A. That's correct, to the compensation carrier.

Q. On November 14th, 1983, you had a conversation with me over the phone, did you not?

A. I don't recall the exact date. I recall you having called the office, yes.

Q. And you stated to me that you would be very surprised if Mr. Foster remembered anything at all, didn't you?

[2-193] A. I don't recall having said that.

Q. Do you recall having a conversation regarding Mr. Foster?

A. Yes.

Q. I am sorry.

A. Yes.

Q. And do you recall telling me anything in your opinion about his memory?

A. This is before I had the benefit of the new CAT scan. But I don't recall specifically what I mentioned with respect to his memory, except as reflected in the testimony I have already given.

Q. Do you remember what your opinion was regarding Mr. Foster's memory before the CAT scan?

A. Well, we just have to—

That was the first letter to the compensation carrier. And, needless to say, every time I see him I send the

carrier a subsequent letter as on July 19th I sent them a letter.

Q. No. My question to you is, do you remember what your opinion was regarding Mr. Foster's recall or memory before the last CAT scan?

A. Well, that would be reflected in the letters.

He now complains of only occasional difficulty with memory and ambulation.

* * * *

[2-197] Q. Now, in this particular situation involving Mr. Foster, would it be fair to say that the injuries resulted in what, in lay terms, is called degenerative loss of memory?

A. No.

Perhaps if you clarify that I could help you. But that's not what it is called.

Q. His memory loss today is worse than it was when he went into the hospital on April 12th, is it not?

A. Well, when he was—as lethargic as he was, it is very difficult to analyze his memory at the moment of impact or shortly thereafter.

So I think it would be an unfair statement.

He is certainly worse now than when he left the hospital, and that is for sure.

Q. And it has been getting progressively worse since he left the hospital, is that not true?

A. Over the last several months, the history would indicate that is correct.

MS. GOMEZ: No further questions.

* * * *

[2-203] [Testimony of Ted Bader]

[2-203] DIRECT EXAMINATION

BY MR. FAHEY:

Q. Mr. Bader, what is your occupation?

A. I'm a physician.

Q. Could you outline your educatonal background for the jury.

A. I went to college in Oklahoma; medical school at Washington University in St. Louis, and I did a family practice internship at Riverside General Hospital.

Q. Sir, what is your present occupation?

A. I'm Chief Medical Officer at the United States Penitentiary in Lompoc.

Q. How long have you been so employed?

A. Since July 1981.

Q. Do you live very far from the prison, sir?

A. No, I don't.

I only live about five minutes away by car.

Q. I want to direct your attention to the date of April 12th, 1982.

Did you get an emergency phone call that morning that there was a problem at the institution?

A. Yes, I did.

Q. Do you recall the approximate time that occurred?

A. That was about 6:15 in the morning.

Q. And did you know the nature of the emergency when [2-204] you received that telephone call?

Were you informed what the emergency was?

A. Very briefly.

It said a staff had been hit and was down, and it was an emergency, and that was all I needed to know in order to start running.

Q. What did you do at that point? Did you go to the hospital?

A. Yes. I got in my car and went to the prison hospital emergency room immediately.

Q. And who was the patient when you arrived?

A. Mr. Foster.

Q. And he was a correctional counselor there at the institution?

A. Yes.

Q. Did you know John Foster very much before this particular incident?

A. I really only knew his name and face. I didn't know him beyond that.

Q. What was his condition—Strike that.

Were you the first physician to come to his aid at that time, sir?

A. Yes. There was—Yes.

Q. What was his condition when you arrived at the hospital, at the prison hospital?

[2-205] A. Well, he was laying on the gurney. There was blood all over the gurney.

He was agitated, thrashing about on the gurney.

There was a physician's assistant there who was trying to hold him down and bandage his head, but John was—

The main thing is that he was thrashing about on the gurney. He wasn't responsive to his name and wouldn't respond to questions, but he was just basically—we were trying to just keep him on the gurney from falling onto the floor.

Q. Did you notice certain head injuries at that time?

A. It is always difficult to tell the exact extent of head injuries.

But there was blood all over his head and it was quite apparent that that was, upon initial looking, that that was the main injury.

Q. Did you consider his wounds to be serious or life-threatening at that time?

A. Yes. With the altered mental status—in other words, he wasn't responsive to who he was and where he was at—Yes, I considered those to be very serious.

Q. What treatment did you begin at that time?

A. Well, the treatment was more of an evaluation in trying to decide where he needed to go for any emergency [2-206] care.

I quickly looked over his head and saw at least one large wound, and so I knew that he'd been hurt, injured in the head quite severely.

And then I did a quick examination of his chest to make sure there were no stab wounds or large wounds there.

I did a quick examination of his abdomen and his back to make sure there weren't any large wounds there.

As a result—that took about one minute—as a result of that examination, plus I took a very quick blood pressure to make sure he wasn't in shock and that the heart and lungs were breathing—as a result of all of that, I made a very quick determination that he had a very severe head injury, and that was the main problem that we were dealing with.

Q. What did you decide to do at that time?

A. Well, after making that determination, it was obvious that he needed to go to the nearest neurosurgical unit as quickly as possible.

Q. Did you make arrangements to have that done?

A. Yes. We called an ambulance and made provision for him to go to Marion Hospital, which is the nearest surgical unit.

Q. And who was his treating physician at that time?

[2-207] A. Dr. Butterfield accepted his care.

Q. Now, after April 12th of 1982, did you visit John in the hospital on any date?

A. Yes, I did.

I recall on April 16th I went and saw him, saw Mr. Foster.

Q. Which unit was he in, do you recall?

A. He was still in the Intensive Care Unit.

Q. Do you recall the approximate time of day that that visit occurred?

A. It was in the afternoon about 2 o'clock.

Q. Could you describe as best as you can at this point to the jury what John's condition was at that time?

A. Well, he was fairly lucid that day. He was carrying on a conversation.

I recall he was able to talk about how he wanted to go fishing that day, and he was in a good mood.

Q. Did he appear delirious or delusional to you at that time?

A. Not at this point.

Q. How long a visit was this?

A. About 10 minutes.

Q. During that conversation, did there come a time when you asked him who his assailant was?

A. Yes, I did. I asked him, "Who assaulted you, John?"

[2-208] Q. What did he say?

A. Without hesitation he said, "I think it was Owens, the D.C. black."

Q. Did you suggest the name of Owens to him before he told you the answer?

A. No. I never mentioned the name of Owens to him prior to that time.

Q. Did anyone else in the room, if there was anybody else in the room, did anybody else mention Owens' name to John Foster?

A. No. To my knowledge, that name had never been told to him.

MR. FAHEY: No further questions, your Honor.

* * * *

EXCERPTS OF TRIAL TRANSCRIPT OF PROCEEDINGS ON DECEMBER 23, 1983

[Testimony of Thomas G. Mansfield]

[5-17] DIRECT EXAMINATION

BY MR. FAHEY:

Q. Mr. Mansfield, what is your occupation, please?

A. A Special Agent with the FBI.

Q. How long have you been so employed?

A. 20½ years.

Q. Which office are you presently assigned to?

A. I'm assigned to the Santa Maria, California resident agency, which is out of the Los Angeles Division of the FBI.

Q. How close is that office to the Lompoc Federal Prison?

A. About 25 miles from the Lompoc Prison.

Q. Now, you are the case agent in this case, are you not?

A. Yes, I am.

Q. And that means in a nutshell that you are assigned to the investigation of this case and you are primarily responsible for that.

Is that correct?

A. Yes, sir.

Q. When did you begin the investigation into the assault on John Foster?

A. The morning of April 12th, 1982.

* * * *

[5-21] Q. Now, during the course of your investigation of this particular case, you interviewed the victim.

Is that right?

A. I did interview the victim, yes.

Q. How many times did you interview John Foster?

A. I interviewed John Foster on two occasions.

Q. When was the first time that you interviewed John Foster?

A. The first time I interviewed Mr. Foster was on April 19th, 1982.

Q. Now, that was about a week after the assault. Right?

A. Yes, it was.

Q. Where did this interview take place?

A. Mr. Foster was interviewed in his hospital bed at the [5-22] Marion Hospital in Santa Maria, California.

Q. And what was his condition when you went in to interview him on April the 19th?

A. On that particular day, he was not alert. I would say that he was somewhat lethargic or groggy.

He was hooked up to intravenous solutions during that interview.

Q. Was he able to discuss with you the facts of the assault at that time?

A. I asked him some questions, and he did make some comments about the assault.

Q. Did you ask him who assaulted him?

A. On that date, I did.

Q. Do you recall what his response was on April 19th?

A. He stated the name of the person who assaulted him sounded similar to the word "coma."

Q. Now, did you continue the interview after you determined that he was somewhat lethargic and groggy?

A. No. The interview lasted probably 10 minutes.

Q. Was there a reason you went out within one week after the assault in an attempt to interview Mr. Foster about the assault?

A. Yes, there was.

Q. What was that reason?

A. Dr. Bader, the staff physician at the prison, passed [5-23] me in the corridor of the hospital, and advised me that he had been by to see Mr. Foster, and during the visit with Mr. Foster, he stated that Mr. Foster had identified the inmate who had assaulted him on April 12th, 1982.

Q. And that is the reason why you went out there on April the 19th?

A. Based on that, I decided to go out and interview Mr. Foster on that date.

Q. What was the second date when you interviewed John Foster?

A. I interviewed John Foster again about three weeks later on May 5th, 1982.

Q. And what was his condition on that date, as you found it?

A. Oh, I found his condition very much improved.

He was alert and very chipper and in very good spirits.

Q. This was just a few days before his release from the hospital?

Is that correct?

A. I believe so, yes.

Q. During the course of this interview, did he ever get incoherent or drift off in any way?

A. No, he was alert and coherent throughout the interview.

[5-24] Q. Did John Foster describe to you on that date how the attack took place?

A. Yes, he did.

Q. What did he tell you about what occurred in the TV room itself?

A. Well, he stated he had gone in the television room that morning, which was his usual function, and he heard footsteps coming up behind him.

MS. GOMEZ: Objection, your honor, hearsay.

THE COURT: Objection sustained.

BY MR. FAHEY:

Q. Well, during the course of this interview, did you ask him who attacked him?

A. Yes, I did.

Q. And what was his response?

A. Inmate Owens.

Q. Was there any hesitancy when he identified Owens?

A. No, there was not.

Q. Did you also show him the photo spread depicting several black males who were similar in appearance?

A. Yes, I did.

MR. FAHEY: Your Honor, may Government's Exhibit 16 be placed before the witness?

THE COURT: Yes.

THE CLERK: Plaintiff's Exhibit 16, previously [5-25] marked, placed before the witness.

(Brief pause)

BY MR. FAHEY:

Q. Mr. Mansfield, can you briefly describe what Government's Exhibit 16 is and what function it serves.?

A. This is a photo spread which I compiled myself to assist in the investigation of the case.

It contains photographs of eight black inmates who were at the U.S. Penitentiary at Lompoc during April 1982.

Q. Now, during the course of your meeting with John Foster on May 5, 1982, did you show him this particular photo spread?

A. Yes, I did.?

Q. Did you ask him who assaulted him?

A. Yes, I did.

Q. Did he point out the picture of anyone on that photo spread?

A. He pointed out the photograph of inmate Owens on the photographic spread.

Q. Now, is there also a photograph of inmate Davis on that photo spread?

A. Yes, there is.

Q. Which picture is he?

A. Davis is Photograph No. 3 on the photographic display.

[5-26] Q. And inmate Owens was No. 2?

Is that correct?

A. Inmate Owens is No. 2 on the photographic display.

Q. And Mr. Curry, inmate Curry?

A. Inmate Curry is shown as photograph No. 6 on this display.

* * * *

[CROSS EXAMINATION]

* * * *

[5-60] Q. And you indicated that when you spoke to Mr. Foster, he was lethargic. Right?

A. Yes.

Q. And he had intravenous tubes attached to him?

A. Yes.

Q. And that he was not very alert. Is that right?

A. Not during my conversation with him, no.

Q. In fact, he was actually incoherent, was he not?

A. He was not alert.

Q. He was incoherent?

A. I don't think I said that.

I think groggy is how I described him, as kind of groggy and lethargic.

But I don't think I would describe him as being incoherent.

Q. I am sorry?

[5-61] A. I don't think I described him as being incoherent.

(Brief pause)

MS. GOMEZ: Could I have just a moment, your Honor?

THE COURT: You may.

(Further brief pause)

BY MS. GOMEZ:

Q. Would you please look at the exhibit before you and look at Exhibit 19.

A. What exhibit is that?

Q. Sorry. The grand jury transcript, Exhibit 76.

Will you please look at Page 19, lines 5 through 7.

A. (Witness reads exhibit.)

I read it, yes.

Q. Do you remember Mr. Fahey asked you a question of "Now, what was his appearance and condition at that time?"

And the answer, "John at that time was somewhat sedated. There were intravenous tubes going into him, and he was not very coherent during that interview."

That was your testimony before the grand jury?

A. Yes. But I didn't say he was incoherent.

Q. Fine.

And during that interview Mr. Foster told you he could not recall the name of the assailant. Is that correct?

A. That's correct.

[5-62] Q. He said the name was similar to "coma"—right?

A. That's correct.

Q. And he told you he had a feeling that he was hit with a pipe. Correct?

A. Correct.

Q. He said he knew he was hit six times because there were six drops of blood on the floor. Right?

A. That's correct.

Q. And that after he was hit the sixth time, he hit the alarm button. Right?

A. Yes.

Q. And the next time you spoke to Mr. Foster was on May 5, 1982. Correct?

A. Correct.

Q. And he was still in the hospital?

A. He was still in the hospital.

Q. And in this second statement, Mr. Foster told you that Mr. Owens-El had been his assailant. Right?

A. Yes.

Q. You don't know, do you, whether anyone had spoken to Mr. Foster regarding Mr. Owens-El prior to your interview with him.

A. No.

Q. During this interview, Mr. Foster also told you that he had hit the assailant in the chest with his middle finger. [5-63] Right?

A. His right middle finger, yes.

Q. And that he had hit him so hard that he had actually broken his finger, Right?

A. That's what he told me.

Q. He also said that the assailant was alone in the room. Right?

A. Yes.

Q. And in this statement he again said he thought he was hit with a pipe. Right?

A. again, yes, He stated he thought he had been hit with a pipe.

Q. And the reason he thought that was because of the metallic sound?

A. On the side of his head, yes.

* * * *

[EXCERPTS OF RESPONDENT'S CLOSING ARGUMENT]

* * * *

[7-59] Let's talk about Mr. Foster's testimony.

Mr. Foster was an honest man—an honest man. He is a good individual. He was just there doing his job, trying to do the best job he could.

And he testified honestly, and he told you, "I was walking into the TV room. I heard footsteps, and before I could turn around, I was hit on the head."

He didn't have a chance to turn around. He did not have a chance to see who the assailant was, and that is very important because, had he seen the assailant, we would not be here today.

But, unfortunately, as much as all of us would like to avenge his injuries—as much as we would like to find the assailant—we can't do it today, and we can't do it tomorrow or the next few days. We can't do it because the wrong man has been accused. The person who should have been accused was not.

Now, although Mr. Foster himself did not testify that he saw his assailant, the government introduced evidence [7-60] by way of Dr. Bader, by way of Mr. Mansfield. These two individuals said, "Well, Mr. Foster told us certain things." And they would have you convict Mr. Owens-El on the basis of statements made by these other individuals, not by Mr. Foster, because Mr. Foster does not recall even speaking to Dr. Bader.

He recalls speaking to Mr. Mansfield. He recalls saying that Owens-El assaulted me, but he doesn't know why he said that. All of a sudden the name popped into his head, but he does not know why he identified him.

He was shown a photo spread, and when he looked at the photo spread he said, "Yes, No. 2, that was Owens-El."

Of course he knew Mr. Owens-El. He knew Mr. Owens-El from the unit. He knew him very well. In fact, he testified that he got along very well with Mr. Owens-El; placed phone calls for him. He had never had any problems with him. There is no question that he knew who he was.

The question is did he say that Mr. Owens-El attacked him because he saw him, or did he say that because someone suggested that name to him.

And the evidence in this case shows, if anything—if it shows anything, it shows that someone must have suggested the name to Mr. Foster, because he did not see the assailant. There is no way that he would be able to [7-61] identify him.

Now, let's talk about each of them. First of all, Dr. Bader. Dr. Bader said he was there on April 15th. He went to see Mr. Foster because the people at the prison, the officers were interested in finding out how Mr. Foster was doing—whether he was feeling better, and so on.

But what did he talk to him about? He talked to him about fishing. In fact, he doesn't remember anything else.

In fact, he doesn't even remember what Mr. Foster looked like. How did he look physically—he couldn't remember. He had his head wrapped. Oh, yes, I remember he had his head wrapped.

Well, did he have intravenous tubes going into him? Oh, yes, I remember that.

Anything I suggested, he remembered, but he didn't seem to have any recollection as to how Mr. Foster actually looked. And Dr. Bader says that when he asked Mr. Foster, "Who assaulted you, John," that without hesitation he said James Owens, the D.C. Black.

Now, how reliable is that statement? How reliable is Dr. Bader?

First of all, Mr. Foster doesn't remember talking to him. Mr. Foster doesn't remember seeing the assailant. There is no evidence that Mr. Owens is a D.C. Black. In [7-62] fact, the evidence is opposite, that Mr. Owens is from Baltimore, Maryland.

Who is a D.C. Black? There has been no testimony introduced as to whether Bowers is a D.C. Black, whether Fox is a D.C. Black, whether Curry is a D.C. Black.

Mr. Mansfield said he spoke to Dr. Bader, and Dr. Bader told him he had had a conversation with Mr. Foster. Did he—how seriously did he take it?

He said he talked to him in the hall, and something like a month—two or three weeks later—he goes to the hospital to speak to Mr. Foster. And when he goes to the hospital to speak to Mr. Foster, he asked him, "Do you know who attacked you?"

And Mr. Foster cannot make an identification. And this is after he supposedly had made an identification to Dr. Bader.

The FBI agent in this case was told by Dr. Bader that there was someone else present—there was someone else there when Dr. Bader spoke to Mr. Foster. It was an assistant warden of the prison, I believe.

Was that person brought in to testify? Was that what his recollection was?

We didn't hear anyone corroborate Dr. Bader. Dr. Bader said he took notes. Have you seen those notes? Have you heard any testimony about those notes? Has he [7-63] brought them in? Did he show the notes to anyone?

He never showed the notes to anyone.

And how reliable is the statement. Remember the setting. You have Mr. Foster, a hospital bed, intravenous

tubes, head wrapped, incoherent, according to what Mr. Mansfield said.

I believe he said he was not coherent rather than incoherent.

You have him being very lethargic, very confused and, in fact, that same day when Dr. Bader said Mr. Foster identified Mr. Owens, Mr. Foster also identified someone else, and you will have that in evidence.

Look at the medical logs for the date April the 16th, 1982. And if you look at that log, you will see where Mr. Foster asked, "Who slugged me? Was it Leo?"

And you heard testimony from Mr. Mansfield that there was a Leo, an inmate in J Unit—Leo Damello.

Leo Damello is not the person charged, but that is who Mr. Foster thought assaulted him, and that is what he said. "Who did this to me? Was it Leo?"

On May 5th, 1982, Mr. Mansfield went to the hospital and spoke to Mr. Foster, and he asked him something to the effect of, "John, do you know who assaulted you?"

And at that point Mr. Foster said, "I think it was James Owens."

[7-64] Now, we don't know what happened between April 12th, 1982 and May 5th, 1982. But we do know that many people visited Mr. Foster. We know that people were concerned about him in the hospital and people at the prison, and they went out to visit with him.

And we know that friends must have come to visit him, and we know his wife was there.

And what do you suppose was the first question that everyone asked him when they went to the hospital. Common sense tells you that the first question would be maybe, "How do you feel?"

The second question would be, "John, do you know who attacked you? Do you know who hit you over the head?"

And the prison officials, what would they ask? They would ask, "John, was it Owens? Did Owens do this?"

And they would ask that because they knew that Mr. Owens was in segregation, and they knew that Fox and Boss Game had said that Mr. Owens did it.

So when they would come to see him, they would say, "Owens did it, didn't he?"

I wonder how many times people came and talked to him and asked him that and kept repeating the name to him over and over and over again — "Owens did it. Owens did it."

So Mr. Mansfield comes in almost a month later, [7-65] and he asks Mr. Foster, "John, who did this?" And he says, "Owens. I think Owens did it. I don't know why I am saying this."

And he couldn't remember, and he told you when he testified he doesn't know why he said that. He said Owens and couldn't remember why he said that.

Well, we know why he said that. The mind is a very curious and strange thing. There have been many studies done in terms of suggestibility. There is an example, for example, where an accident is shown to a group of people, and this is an accident that happens right in front of a "Yield" sign. And the whole movie is shown. And then after the movie is over, they asked the people who were participating in this little experiment, "How fast was the blue car going when it came up to the stop sign?"

And people will say, "Well, I think he was going 50 miles—No, no, he was going 30 miles—" And everyone has different opinions, and they discuss this for a while in terms of the accident occuring and whose fault it was and so on.

And then people are told that there was not a stop sign; it was a yield sign, and people refused to believe that,

because in their minds they were asked a leading question. They were asked, "How fast was the car going when it came up to the stop sign?" And then the brain [7-66] conditions itself to believing that it was a stop sign. They can't believe it was anything else but a stop sign, because that idea was implanted in their minds.

Now, furthermore, there is another reason why there has to be a reasonable doubt regarding the identification of Mr. Foster, and that is Dr. Butterfield's testimony. Dr. Butterfield testified that he did not think that Mr. Foster was susceptible to suggestion. Yet, common sense tells you otherwise.

The setting, how Mr. Foster was in the hospital, how he was incoherent, how people visited him and he didn't even know they were there, and he doesn't even know what he was told.

* * * *

Supreme Court of the United States

No. 86-877

UNITED STATES, PETITIONER

v.

JAMES JOSEPH OWENS

ORDER ALLOWING CERTIORARI. *Filed February 23, 1987.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit* is granted.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1987 181483 40508

PETITIONER'S

BRIEF

No. 86-877

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES JOSEPH OWENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROBERT H. KLONOFF
Assistant to the Solicitor General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Confrontation Clause was violated as a result of the in-court testimony of an assault victim, who recalled in detail his pretrial identification of respondent as his assailant but who could not remember certain details of the assault itself.

2. Whether Fed. R. Evid. 801(d)(1)(C) bars an assault victim from testifying at trial about his out-of-court identification of his assailant, when the victim has suffered a partial memory loss concerning the assault but has a full recollection of the identification.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statute and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-877

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES JOSEPH OWENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 789 F.2d 750.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a) was entered on May 12, 1986. A petition for rehearing was denied on September 2, 1986 (Pet. App. 32a). On October 20, 1986, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including December 1, 1986. The petition for a writ of certiorari was filed on December 1, 1986, and was granted on February 23, 1987 (J.A. 86). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

Rule 801(d) of the Federal Rules of Evidence provides in pertinent part:

> A statement is not hearsay if—(1) * * * The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * (C) one of identification of a person made after perceiving him * * *.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, respondent, a federal prisoner, was convicted of assault with intent to commit murder, in violation of 18 U.S.C. 113(a). He was sentenced to 20 years' imprisonment, to be served consecutively to the sentence he was already serving.

1. The evidence at trial showed that on the morning of April 12, 1982, 61-year-old John Foster, a correctional counselor at the federal prison in Lompoc, California, was assaulted and beaten with a metal pipe. In an effort to prove that it was respondent who beat Foster, the government called 14 witnesses, including Foster, three inmate eyewitnesses, and an inmate to whom respondent made inculpatory statements about the crime. The government also introduced physical evidence, including clothing belonging

to respondent that contained blood spots matching Foster's blood type.

a. The government's evidence revealed that on the day before the attack, several inmates discussed a plan to attack Foster. On that day, respondent attended a meeting of a prison religious group, called the "Moorish Science Temple of America" (the Moors). During the meeting, one of the inmates stated that "a move would have to be made in order to gain some kind of respect." He added that he was "tired of [Foster] fucking with [him]." Respondent, who was one of the leaders of the Moors, repeated those observations and expressed agreement with them. 4 Tr. 120-121, 126-128; 6 Tr. 141.[1]

The next morning, Foster arrived for work at the Lompoc prison and went to his office at the prison's "J" unit. After releasing the 94 inmates in the J unit for breakfast, Foster went to the unit's television room to check for contraband. While he was inside the television room, Foster was struck several times on the face, head, and upper body. J.A. 19-20, 22-27, 49-52.

Inmate Reginald Bowers was one of the three inmate eyewitnesses to the assault who testified at trial. On the morning of the assault, Bowers was on a landing near the J unit television room, when he saw inmates Melvin Davis and Cecil Curry, whom he had seen the day before at the Moors' meeting. After one of them told Bowers that he "shouldn't be coming up here," Bowers heard a "shuffling-like noise" com-

---

[1] A roll call sign-up sheet of the Moors' meeting confirmed that a meeting had in fact occurred and that respondent had been in attendance (6 Tr. 144-146).

ing from the room. Upon opening the door, Bowers saw Foster lying on the floor, shaking and going into convulsions. Respondent was standing over Foster holding a metal pipe. When he saw Bowers, respondent asked him what he was doing there, swung something at him, and ran out the door. 4 Tr. 120, 136-142.

Inmate Albert Washington also witnessed the assault. While on his way to the laundry room on the morning of the assault, Washington heard crying or moaning sounds coming from the television room. He looked through the window of the room and observed respondent, who was wearing a gray sweatshirt, repeatedly strike Foster on the arm with a pipe. Washington also saw Curry and Davis at the scene of the assault. 1 Tr. 238-249, 269.

Inmate Michael Jeffery also witnessed the incident. Jeffery was taking a shower when he heard a "gurgling, loud strangling noise." Jeffery left the shower, went to the door of the television room, and looked inside, where he observed respondent repeatedly strike Foster with a "long round object" that "could have been a pipe." After returning to the shower, Jeffery saw respondent enter an adjacent mop room. He then heard respondent tell Davis to throw respondent's sweatsuit top out the window. Jeffery watched as Davis appeared to do so. 3 Tr. 16-21, 24-26.[2]

---

[2] The court of appeals indicated (Pet. App. 22a-23a) that the credibility of the inmate witnesses was open to question because of their criminal records and their knowledge that they might benefit from cooperating with the government. Inmate witnesses, of course, always have prior records and an incentive to cooperate. The court also noted (*id.* at 23a) that there were inconsistencies among the inmates' accounts of the crime and that some of the inmates had themselves given prior inconsistent statements. The inmates, however, testified that a prisoner who cooperates with the authorities runs the risk of repercussions from fellow prisoners (1 Tr. 250-252; 3 Tr. 30-31; 4 Tr. 144, 159), a factor that may explain the inmates' initial reluctance to reveal the true extent of their knowledge concerning the assault. While the testimony of the inmates differed on certain details, it did not differ in ways that would have shown that some or all of the inmates must have been lying. Moreover, the inmates' testimony was corroborated by other evidence, including physical evidence introduced at the trial that was not subject to fabrication.

During the assault, Foster set off the body alarm that he was carrying with him. Prison officials discovered Foster in the television room lying in a pool of blood, and they immediately rushed him to the hospital. J.A. 31; 1 Tr. 198-201.

Following the assault, prison officials found a bloody metal pipe in the prison yard, a sweatsuit top outside the mop room window (where Jeffery had seen the garment thrown), and a pair of khaki trousers in an unassigned J unit cell. Blood stains on both the sweatsuit and the trousers matched Foster's blood type. J.A. 52; 3 Tr. 118; 4 Tr. 101-104, 253, 255-256. Washington identified the sweatsuit top as the one worn by respondent during the assault; Jeffery identified it as the one he saw Davis throw out the window at respondent's direction; and a prison official recognized it as one worn by respondent on a daily basis prior to the assault. 1 Tr. 193-195, 246-247; 3 Tr. 28. In addition, a photograph of respondent wearing what appeared to be the same sweatsuit top was found among his belongings (5 Tr. 34). The khaki pants were also identified as similar to the prison-issued pants typically worn by respondent,

and when respondent tried them on at trial, they fit him (1 Tr. 195-197; 5 Tr. 10-11).

During the investigation of the assault, prison authorities placed respondent in a segregation unit. While he was there, respondent became acquainted with another inmate, Douglas Ridinger, who worked as an orderly. Approximately a week after the assault, Ridinger asked why Foster had been assaulted. Respondent replied, using words similar to those spoken at the Moors' meeting on April 11, 1982, that "this is something we have to do in order to get respect, just plain and simple." 3 Tr. 124-130, 144-145; 4 Tr. 59.

The medical evidence at trial revealed that Foster suffered fractures to his skull, cheekbone, arm, and right middle finger, as well as various other injuries. He was initially very confused and disoriented and could remember little more than his name. According to Foster's neurosurgeon, at least five hard blows with a blunt instrument were necessary to cause the head injuries alone. The neurosurgeon performed emergency surgery on the day of the assault to relieve pressure on Foster's brain caused by the fractured skull. Foster initially showed some improvement, but then began to suffer periods of confusion and disorientation. After additional surgical procedures were performed, Foster was released from the hospital on May 10, 1982. J.A. 49-55; 2 Tr. 156-157, 162-165, 172-175.

During his hospital stay, Foster was visited by Dr. Ted Bader, the prison physician. As Dr. Bader recounted at trial, when he asked Foster who had assaulted him, Foster responded, without hesitation, "I think it was Owens, the D.C. black" (J.A. 72). FBI Agent Thomas G. Mansfield, who was investigating the assault, learned about Foster's statement and attempted to interview him. Foster appeared lethargic and groggy, however, and when Mansfield asked who had assaulted him, Foster's only response was a word that sounded like "coma." A few days prior to Foster's release from the hospital, Mansfield interviewed him again. This time, according to Mansfield's testimony, Foster's condition had improved substantially. Foster, who was alert and coherent, described how the attack had occurred, said that respondent was his assailant, and selected respondent's photograph from a photospread. J.A. 73-77.

b. Foster testified at length at the trial (J.A. 13-49).[3] After describing his professional background (J.A. 13-19), Foster testified that he knew respondent as an inmate of the J unit (J.A. 19). He recalled that, on April 12, 1982, he arrived at the prison at 5:35 a.m. He first obtained a body alarm and the keys to the J unit. He then went to the counselor's office in the unit, where he made a pot of coffee and

---

[3] At the commencement of the trial, respondent's attorneys objected to the introduction of evidence concerning Foster's out-of-court identification. They stated that when they interviewed Foster, he said he could not recall the identity of his assailant and could not remember why he told Mansfield that it was respondent. They argued that Foster therefore was not subject to cross-examination concerning his out-of-court identification. J.A. 5-12. The district court overruled the objection and denied respondent's motion for a hearing concerning Foster's present recollection (J.A. 10-12). The court of appeals stated (Pet. App. 7a n.4) that the government's offer of proof differed substantially from Foster's testimony at trial, and it suggested that Foster's memory loss was far worse than the offer of proof had indicated. In fact, however, the offer of proof was accurate, as respondent conceded below (Owens C.A. Br. 7).

recorded the inmate count in a logbook. Shortly after 6 a.m., he was called by a superior and instructed to begin feeding the prisoners. Foster opened the doors to each range of cells, and he entered the J unit television room to inspect it for contraband. Shortly after entering the room, he felt an impact on his head. Although he could not remember the identity of the person who struck him, he recalled that his assailant was armed with a piece of pipe. He also recalled that, following the assault, he looked down and saw blood on the floor. Foster testified that his injuries included a fractured skull, cuts and bruises, and a broken arm. Foster also recalled injuring his right middle finger when he jammed it into his assailant's chest. J.A. 20-29, 34.

Foster explained that the next thing he remembered after being hit was waking up at the hospital. The one hospital visit he recalled at trial was a visit by Agent Mansfield. J.A. 27-28, 30-31. Foster testified that "[a]s to what I told Mr. Mansfield that day, it is very vivid in my mind" (J.A. 31; see also *id.* at 28). In particular, Foster remembered telling Mansfield that "after I was hit I looked down and saw the blood on the floor, and jammed my finger into Owens' chest, and said, 'That's enough of that,' and hit my alarm button" (J.A. 31). He indicated, moreover, that at the time he spoke to Mansfield, there was no doubt in his mind that what he had said was accurate. In addition, Foster recalled that Mansfield asked him to identify his assailant from a group of photographs and that he selected respondent's picture. J.A. 31-32.

Foster was subjected to extensive cross-examination, during which he acknowledged that "[a]t this time he [did not] remember" seeing his assailant

(J.A. 35). In response to defense counsel's inquiries, he also conceded that while his statement to Mansfield was "vivid," he could not recall making any other statements during his stay at the hospital, and he did not remember asking (as reflected in a medical report) who his assailant was or whether it was "Leo" (J.A. 36, 38, 41). He admitted that, although many people, including his wife, had apparently visited him during his hospital stay, he did not recall any of the visits except the visit by Mansfield that he had described (J.A. 41-42, 44-45). Foster stated that the assailant was "vivid in [his] mind when [he] had given the information to Mr. Mansfield," but he was unable to explain the basis for his identification (J.A. 45).[4]

During summation, respondent's attorney emphasized Foster's testimony about his loss of memory, as elicited during cross-examination. She argued that Foster had admitted that he could not recall seeing his assailant and could not remember why he had told Mansfield that respondent had committed the assault. From that she suggested that Foster probably had made the identification as the result of suggestions by persons who had visited him in the hospital. J.A. 80-85.

2. On appeal, respondent renewed his challenge to the admission of Foster's out-of-court identification. The Ninth Circuit reversed respondent's conviction by a divided vote, holding that because of Foster's memory loss, the defense was unable to cross-

[4] At one point during cross-examination, Foster acknowledged that he did not know whether his identification was based on statements that hospital visitors may have made to him (J.A. 45). During subsequent cross-examination, however, he testified that he "doubt[ed]" whether his identification was based on something other than his personal observation of his assailant (J.A. 46-47).

examine him effectively (Pet. App. 1a-23a). Although the court recognized that respondent's attorneys were "not restricted in their questioning of Foster" on the relevant issues (*id.* at 11a), it determined (*id.* at 15a) that Foster's responses did not give the jury "the information it needed in order to determine whether Foster had perceived his attacker, accurately or at all, or whether at the time he made the identification, his memory correctly reflected his perceptions." The court (*id.* at 17a-18a) explicitly rejected the approach taken by the Third Circuit in *United States ex rel. Thomas* v. *Cuyler*, 548 F.2d 460, 463 (1977), which held that the Confrontation Clause is not violated if the witness is sworn and agrees to testify, even if he asserts an actual or feigned memory loss.

In addition, the court of appeals held (Pet. App. 8a-11a) that the admission of Foster's pretrial identification violated Fed. R. Evid. 801(d)(1)(C). The court construed Rule 801(d)(1)(C) to require cross-examination not only about the identification itself, but also about "the facts and circumstances *underlying* the identification," namely, "the reasons why [the declarant] made the identification" (Pet. App. 9a) (emphasis in original). The court held that because of Foster's memory loss, respondent was prevented from adequately exploring the basis for the pretrial identification (*id.* at 11a).

The court concluded that the violation of Rule 801(d)(1)(C) was harmless under the standard applicable to non-constitutional errors, in light of the testimony of the inmate eyewitnesses, the evidence of respondent's inculpatory remarks concerning the assault, and the physical evidence linking respondent to the crime (Pet. App. 12a). The court ruled, however, that the violation of the Confrontation

Clause was *not* harmless under the standard applicable to constitutional errors. Because the court could not find that the Confrontation Clause violation was harmless beyond a reasonable doubt, it reversed respondent's conviction (*id.* at 22a-23a).

Judge Boochever dissented. He stated that, in his view, the Confrontation Clause does not require that cross-examination actually be effective but only that the defendant be given the *opportunity* for effective cross-examination (Pet. App. 29a). He pointed out that Foster "answered all questions put to him; he stated what he could remember and what he could not remember" (*ibid.*). According to Judge Boochever (*id.* at 26a-27a, 29a), the cross-examination conducted by respondent's attorney at trial gave the jury an adequate basis to assess Foster's demeanor and to determine whether to credit his out-of-court identification. Judge Boochever therefore concluded that the Confrontation Clause was not violated.

Judge Boochever also stated that, in his view, the requirements of Fed. R. Evid. 801(d)(1)(C) were met. He indicated that the Rule, by its terms, requires only that the witness be subject to cross-examination concerning the out-of-court statement itself, not that he be subject to cross-examination concerning the circumstances underlying the identification. The Rule's requirement was met, he concluded, because Foster had a complete recollection of his statement to Mansfield, even though he did not remember why he was able to identify respondent. Pet. App. 25a-26a.[5]

---

[5] Judge Boochever indicated (Pet. App. 24a-25a) that he would have remanded the case to the district court for a determination under Fed. R. Evid. 602 whether Foster had actually seen his assailant at the time of the incident.

SUMMARY OF ARGUMENT

I.A. The principal question in this case is whether the Sixth Amendment right of confrontation was violated by the admission of Foster's out-of-court identification of respondent as his assailant, where Foster testified at trial about his prior identification, but acknowledged a partial memory loss concerning various details of the underlying assault. The court of appeals held that, because of Foster's memory loss, he was not subject to "meaningful" or "effective" cross-examination concerning his out-of-court statement, which the court believed was required by the Confrontation Clause (Pet. App. 16a, 23a). We submit that the Confrontation Clause does not guarantee that a witness will have a certain threshold of memory concerning the events in question or that a defendant's cross-examination of him will be effective in any specific way.

This Court has never found a violation of the Confrontation Clause based on the loss of memory by a witness who testified at trial. Rather, the Court has adopted the position that the Confrontation Clause provides no guarantee against testimony "that is marred by forgetfulness, confusion or evasion" (*Delaware* v. *Fensterer*, No. 85-214 (Nov. 4, 1985), slip op. 6). In *California* v. *Green*, 399 U.S. 149, 168-169 (1970), the Court raised but did not reach the question whether an out-of-court statement can be admitted, consistent with the Confrontation Clause, when the declarant testifies at trial but asserts a total or partial memory loss with regard to the statement or the underlying events. In his concurring opinion in *Green*, however, Justice Harlan answered the question left open by the Court. He took the position that, if a witness is physically

present at trial, the fact that he "cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence" (*id.* at 188).

In our view, Justice Harlan's analysis of the Confrontation Clause implications of a witness's memory lapse is correct. By physically producing the witness, the government has done everything within its power to enable the defense to confront him and show why he should not be believed. Because the witness is present in court, the jury can observe his demeanor and assess his credibility. Furthermore, while a witness's memory loss may sometimes hamper cross-examination to some extent, it is just as often the case that the exposure of memory loss serves to discredit the witness's testimony. But in no event should the quality of a witness's recollection give rise to a Sixth Amendment claim.

The constitutional significance of memory loss should not be different simply because, as in this case, a witness's prior statements are involved. Even when such statements are introduced, the Confrontation Clause is satisfied because the jury has the declarant before it and can decide, based on his testimony and demeanor, whether (and to what extent) his prior statement should be credited. The jury is not being asked to consider statements made by someone who is not present at trial and subject to cross-examination.

Accordingly, it is our submission that a witness's memory loss has no Sixth Amendment consequence and that his physical presence at trial satisfies the Confrontation Clause as long as (1) he does not

assert his right against self-incrimination or otherwise refuse to testify, (2) he is capable of understanding the nature of the proceedings and of engaging in a question and answer dialogue, and (3) the scope of cross-examination is not improperly restricted by the trial court. In the present case, Foster testified under oath in the presence of the jury and answered all questions posed to him to the best of his ability. Apart from routine evidentiary rulings, the trial court allowed respondent to engage in unrestricted cross-examination. Under these circumstances, there was no denial of respondent's right of confrontation.

B. Even if the Confrontation Clause were construed to require that a witness possess a sufficient memory to facilitate "meaningful" or "effective" cross-examination, such a requirement would have been fully satisfied in this case. Foster had a clear recollection of his out-of-court statement. In addition, he was able to recall numerous details surrounding the assault, including the type of weapon that was used, the injuries he sustained, the location of the incident, and the fact that he jammed his finger into his assailant's chest. Respondent's cross-examination of Foster was effective in showing that Foster could not recall whether he had seen his assailant. Respondent made use of that fact to discredit Foster's out-of-court identification by arguing to the jury that Foster did not see his assailant but instead based his identification on statements made by others. In short, respondent's cross-examination of Foster was "effective" or "meaningful" under any reasonable standard.

II. The admission of Foster's out-of-court identification of respondent was also consistent with Fed.

R. Evid. 801(d)(1)(C). The court of appeals interpreted Rule 801(d)(1)(C) to forbid testimony about a prior identification unless the declarant testifies at trial and has a clear memory not only of his prior identification but also of the underlying events. We believe that the court's interpretation is erroneous for three reasons. First, even if the witness cannot recall the out-of-court statement or the underlying events, he is nonetheless "subject to cross-examination," provided that the scope of cross-examination is not improperly restricted by the trial court and the witness is present at trial, understands the proceedings, and is willing to testify. Second, even if the Rule is construed to require that the declarant have sufficient recollection of prior events to be able to supply detailed information on cross-examination, the Rule requires only that the declarant be subject to cross-examination "concerning the statement," not "concerning the subject matter of [the] statement." Compare Fed. R. Evid. 804(a)(3). In reaching the contrary conclusion, the court of appeals completely disregarded the plain language of the Rule. Third, the court's interpretation is contrary to the purpose of the Rule. Rule 801(d)(1)(C) was added to the Federal Rules of Evidence to ensure that prior statements of identification are not excluded when a witness's memory has faded by the time of trial. The court's interpretation totally defeats this legislative intent by allowing prior statements of identification to be offered at trial only when the declarant has *not* suffered a memory loss concerning the underlying events.

In the present case, Foster was available for unrestricted cross-examination at trial. Even if that were not enough, the record also shows that Foster

had a clear recollection of his prior statement, and was thereby capable of answering detailed questions concerning that statement. Accordingly, the requirements of Rule 801(d)(1)(C) were satisfied, and Foster's prior identification of respondent was properly admitted at trial.

ARGUMENT

I. THE ADMISSION OF FOSTER'S OUT-OF-COURT IDENTIFICATION DID NOT VIOLATE THE CONFRONTATION CLAUSE

A. The Memory Loss Of A Witness Who Testifies Under Oath At Trial "Does Not Have Sixth Amendment Consequence"

1. The Confrontation Clause of the Sixth Amendment provides that the accused in a criminal prosecution shall have the right "to be confronted with the witnesses against him." As this Court has emphasized, the Confrontation Clause "reflects a preference for face-to-face confrontation at trial." *Ohio* v. *Roberts*, 448 U.S. 56, 63 (1980) (citing *California* v. *Green*, 399 U.S. 149, 157 (1970); *Barber* v. *Page*, 390 U.S. 719, 725 (1968)).[6]

The right of confrontation embodied in the Sixth Amendment developed during the 17th century in

[6] Although the Confrontation Clause could be read to require the exclusion of every statement made by a declarant who is not present at trial, that interpretation "would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme" (*Roberts*, 448 U.S. at 63). As this Court has made clear, a variety of out-of-court statements are considered to carry sufficient "indicia of reliability" to be admissible even in the absence of cross-examination. See *Lee* v. *Illinois*, No. 84-6807 (June 3, 1986), slip op. 12-13; *Roberts*, 448 U.S. at 64-65; *Mancusi* v. *Stubbs*, 408 U.S. 204, 213-216 (1972); *Dutton* v. *Evans*, 400 U.S. 74 (1970).

response to the practice of prosecuting defendants based on ex parte affidavits or depositions rather than on live testimony. See *Green*, 399 U.S. at 156-157; see generally *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 420-421 (1979) (Blackmun, J.); 3 W. Blackstone, *Commentaries on the Law of England* 373-374 (1768).[7] As this Court has explained (*Green*, 399 U.S. at 157-158, quoting *Mattox* v. *United States*, 156 U.S. 237, 242-243 (1895)), trial by affidavit deprived the defendant of " 'an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' "

Based on the historical roots of the right of confrontation,[8] this Court has identified three specific values that the Confrontation Clause was designed to serve: (1) to insure that the witness gives his statements under oath, "thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury";

[7] The objection was not to the use of out-of-court statements per se, but only to their use without the declarant being present at trial. See *Green*, 399 U.S. at 157 ("So far as appears, in claiming confrontation rights no objection was made against receiving a witness's out-of-court depositions or statements, so long as the witness was present at trial to repeat his story and to explain or repudiate any conflicting prior stories before the trier of fact.").

[8] The history of the Confrontation Clause is discussed at length in our brief in *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986). A copy of that brief has been provided to counsel for respondent.

(2) to "force[] the witness to submit to cross-examination"; and (3) to permit the jury "to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Green*, 399 U.S. at 158 (footnote omitted). See also *Roberts*, 448 U.S. at 63-64 & n.5. These values are undermined when a court improperly restricts defense efforts to cross-examine a witness. See *Delaware* v. *Van Arsdall*, No. 84-1279 (Apr. 7, 1986); *Davis* v. *Alaska*, 415 U.S. 308 (1974); *Smith* v. *Illinois*, 390 U.S. 129 (1968). Likewise, these values are not served when cross-examination is impeded because the witness is unable to understand the proceedings or because he has refused to testify. See *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Mayes* v. *Sowders*, 621 F.2d 850 (6th Cir.), cert. denied, 449 U.S. 992 (1980); *United States* v. *Fiore*, 443 F.2d 112 (2d Cir. 1971), cert. denied, 410 U.S. 984 (1973). By contrast, when a witness is present for cross-examination at trial, and when the court does not improperly curtail the defendant's cross-examination, the three objectives of the Confrontation Clause are served even if the witness suffers from a lapse of memory regarding the events that are the subject of his testimony. It is therefore our submission that, notwithstanding the quality of a witness's memory, the physical presence of the witness satisfies the Confrontation Clause as long as (1) the scope of cross-examination has not been impermissibly restricted by the trial court or by statute; (2) the witness is physically and mentally capable of understanding the proceedings and engaging in a question and answer dialogue; and (3) the witness does not assert his Fifth Amendment privilege or otherwise refuse to testify or be sworn.

In the present case, Foster testified under oath and answered every question posed to him to the best of his ability. The jury was able to observe his demeanor and evaluate his credibility. Moreover, as the court of appeals acknowledged (Pet. App. 11a), respondent's ability to engage in unfettered cross-examination of Foster was not impeded by the trial court. Under these circumstances, there was no denial of respondent's right of confrontation.

2. This Court has never held that a witness's memory loss deprives a defendant of the right of confrontation. To the contrary, the Court's decisions support our submission that, if the witness is present at trial for cross-examination, the requirements of the Confrontation Clause are satisfied.

In *California* v. *Green*, *supra*, the Court addressed the possible Sixth Amendment implications of admitting a witness's prior statements as substantive evidence at trial. In that case, a minor named Porter, who had been arrested for selling marijuana to an undercover officer, informed the police and later testified during a preliminary hearing that defendant Green had been his source for the drugs. During Green's trial for furnishing marijuana to a minor, the officer recounted Porter's statement to him, and the preliminary hearing transcript was admitted as well. When Porter claimed during his own testimony that he could not recall how he had obtained the marijuana, the prosecutor read excerpts from Porter's preliminary hearing testimony. On cross-examination, however, Porter stated that, although he recalled his former testimony and his statement to the officer, he was still unsure of the actual episode. 399 U.S. at 151-152.

The California Supreme Court held that the introduction of Porter's prior statements as substantive evidence violated the Confrontation Clause. This Court reversed. The Court first concluded that as a general matter the admission of a pretrial statement does not offend the Confrontation Clause as long as the declarant is subject to cross-examination at trial (399 U.S. at 162-164). According to the Court (*id.* at 162), "where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases * * * support the conclusion that the admission of his out-of-court statements does not create a confrontation problem." The Court further held that, in any event, the preliminary hearing testimony was admissible since Porter was subject to cross-examination during that proceeding (*id.* at 165-168). The Court remanded the case to the California Supreme Court, however, to address the "narrow question" whether the trial court erred in introducing Porter's statement to the officer. The Court noted (*id.* at 168-169) that in light of the failure of the lower court or the parties to focus on the issue, it was premature for the Court to decide "[w]hether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case * * *."[9]

In a concurring opinion, Justice Harlan addressed the issue that the Court did not reach. He expressed

[9] On remand, the California Supreme Court concluded that Porter's statement to the police was properly admitted because Porter testified at trial under oath, he was subject to cross-examination, and the jury was able to observe his demeanor. *People* v. *Green*, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971), cert. dismissed, 404 U.S. 801 (1972).

the view that, to satisfy the requirements of the Confrontation Clause, all that was necessary was for the "prosecution [to] produce[] its witness, Porter, and ma[ke] him available for trial confrontation." 399 U.S. at 188. According to Justice Harlan, "[t]he fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence." In his view, "the prosecution has no less fulfilled its obligation simply because a witness has a lapse of memory." *Id.* at 188-189.

This Court's subsequent decisions are fully consistent with Justice Harlan's analysis in *Green*.[10] In

[10] The court of appeals stated (Pet. App. 18a) that Justice Harlan repudiated his approach in *Green* a year later in *Dutton* v. *Evans*, 400 U.S. 74, 93-100 (1970) (concurring opinion). That characterization misconstrues Justice Harlan's position in those two cases. In *Evans*, Justice Harlan indicated that he was retreating from his suggestion in *Green*—not pertinent here—that the government has an obligation to produce witnesses who are reasonably available. His revised view was that the Confrontation Clause simply gives a defendant an opportunity to cross-examine those witnesses who are actually produced by the government, and that the admission of hearsay when the declarant is not produced should be evaluated under a due process standard of fundamental fairness. That revised view—which *reduced* the government's obligations under the Confrontation Clause—can in no way be read as a repudiation by Justice Harlan of his position in *Green* that a witness's memory loss has no Sixth Amendment significance.

The court of appeals also stated (Pet. App. 18a) that this Court rejected Justice Harlan's approach in a footnote in *Roberts*, 448 U.S. at 66 n.9. The cited footnote in *Roberts*, however, does not constitute a rejection of Justice Harlan's

Delaware v. *Fensterer*, an FBI fiber analyst who testified at trial could not recall the scientific method he had used as a basis for his opinion that a hair found on the murder weapon had been forcibly removed. The Supreme Court of Delaware reversed the defendant's conviction on Confrontation Clause grounds (493 A.2d 959 (1985)), holding that, in light of the lapse in the expert's memory, the defendant's cross-examination of him was "nothing more than an exercise in futility" (*id.* at 964). According to that court, "[e]ffective cross-examination and discrediting of [the expert's] opinion at a minimum required that he commit himself to the basis of his opinion" (*ibid.* (footnote omitted)).

This Court summarily reversed, holding that the requirements of the Confrontation Clause were satisfied. The Court recognized that the defense has the right to test the witness's memory and perception

---

general approach to the Confrontation Clause, much less his approach to the particular problem presented here—the role of a witness's memory loss in Confrontation Clause analysis. Rather, the Court was simply noting that it had not adopted Justice Harlan's general thesis that the "Confrontation Clause requires only that the prosecution produce available witnesses" (*id.* at 67 n.9). Indeed, consistent with Justice Harlan's approach, the Court in *Roberts* declined to consider whether the questioning of the witness at issue in that case, which occurred not at trial but at a preliminary hearing, "surmount[ed] some inevitably nebulous threshold of 'effectiveness'" (*id.* at 73 n.12). It held (*ibid.*) that in all but "extraordinary cases," such as where a question of ineffective assistance of counsel is involved, "no inquiry into 'effectiveness' is required." Moreover, in *Delaware* v. *Fensterer*, a post-*Roberts* case, the Court (slip op. 6) left open whether a witness's memory loss could ever amount to a Confrontation Clause violation.

during cross-examination, but it held that the right to cross-examine is not denied simply because a lapse of memory impedes one method of discrediting the witness (*Fensterer*, slip op. 4). It explained that "'[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*'" and that as a general rule, the Confrontation Clause merely "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 4-5 (emphasis in original; citation omitted). According to the Court (*id.* at 5), the "assurances of reliability" that the right of cross-examination was intended to protect were "fully satisfied" notwithstanding the witness's memory loss, because "the factfinder [could] observe the witness' demeanor under cross-examination, and the witness [was] testifying under oath and in the presence of the accused." Although the *Fensterer* Court did not decide whether there are any circumstances in which a witness's lack of recollection may so frustrate cross-examination as to violate the Confrontation Clause, it noted (*id.* at 6-7) that "the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [a witness's memory loss] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony."

Most recently, in *Pennsylvania* v. *Ritchie*, No. 85-1347 (Feb. 24, 1987), the Court addressed the question whether the Confrontation Clause required disclosure to the defense of confidential records relating to a state protective services agency investigation of a sexual assault on a minor with which the defendant was charged. The Supreme Court of Pennsyl-

vania had held that the right to such disclosure was required by the Confrontation Clause because the records were necessary to permit counsel to prepare for cross-examination of the government's witnesses at trial.

A plurality of the Court rejected the Pennsylvania Supreme Court's rationale on the ground that the right of confrontation was "a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination" (*Ritchie*, slip op. 11 (emphasis in original)). The plurality explained (*id.* at 11-12) that this principle had been established in a line of cases, including *Fensterer*. In discussing *Fensterer*, the plurality indicated that while the expert witness's memory loss "frustrated defense counsel's efforts to discredit the testimony," the Sixth Amendment "was not implicated, 'for the trial court did not limit the scope or nature of defense counsel's cross-examination in any way' " (*Ritchie*, slip op. 12 (quoting *Fensterer*, slip op. 4)). The plurality noted (*Ritchie*, slip op. 12 (footnote omitted)) that "*Fensterer* was in full accord with our earlier decisions, that have upheld a Confrontation Clause infringement claim * * * only when there was a specific statutory or court-imposed restriction at trial on the scope of questioning." [11]

[11] The plurality in *Ritchie* ultimately concluded that the case should be remanded on due process grounds so that the trial court could review the agency's file in camera to ascertain whether there was any exculpatory material (*Ritchie*, slip op. 15-20). Justice Blackmun did not join in the plurality's analysis of the Confrontation Clause issue, but he agreed with the plurality that the case should be remanded for an in camera review of the file (slip op. 1-5 (Blackmun, J., concurring)). Justices Brennan and Marshall disagreed with

As the plurality's analysis in *Ritchie* revealed, there is a critical difference, for Sixth Amendment purposes, between impediments to cross-examination resulting from restrictions by the trial court or by statute, and impediments resulting merely from the circumstances in which the case is tried. Thus, under the analysis adopted by the plurality in *Ritchie*, even though extrinsic circumstances—such as the denial of discovery—may render the defendant's cross-examination less effective than it might otherwise have been, there is no Confrontation Clause violation as long as the cross-examination at trial is unrestricted. It follows *a fortiori* that a circumstance over which the government has no control—such as a witness's memory loss— cannot result in a Confrontation Clause violation, even if that circumstance renders the defendant's cross-examination less effective than he would like.

3. Notwithstanding Foster's presence at trial and respondent's ability to conduct essentially unrestricted cross-examination of him, the court of appeals held that Foster's memory loss resulted in a violation of the Sixth Amendment. The court relied heavily on the fact that an out-of-court statement by Foster was introduced, and it found *Fensterer* inapplicable for that reason (Pet. App. 12a-13a & n.7). The determination whether a witness's memory loss has Sixth Amendment implications, however, should not depend on whether an out-of-court statement is involved. To be sure, the Court in *Fensterer* (slip op. 6) and

the plurality's analysis of the confrontation question (slip op. 1-7 (Brennan, J., dissenting)); Justices Stevens and Scalia expressed no view on that issue (slip op. 1-7 (Stevens, J., dissenting)).

Green (399 U.S. at 168-169) explicitly declined to reach the question whether a witness's memory loss violates the Confrontation Clause when an out-of-court statement of the witness is introduced. Nonetheless, the policies underlying the Confrontation Clause suggest that the result should not turn on that distinction.

First, the typical hearsay and confrontation concerns involving out-of-court statements are largely eliminated when the declarant is present at trial and subject to cross-examination concerning his earlier statement. As this Court stated in *Green* (399 U.S. at 158), "if the declarant is present and testifying at trial, the out-of-court statement for all practical purposes regains most of the lost protections."[12] See also *id.* at 188 (Harlan, J., concurring) (when declarant is present at trial, his out-of-court statement "is hearsay only in a technical sense since the witness may be examined at the trial as to the circumstances of memory, opportunity to observe, meaning, and veracity"); *People* v. *Gould*, 54 Cal. 2d 621, 626, 354 P.2d 865, 867, 7 Cal. Rptr. 273, 275 (1960) (quoted in *Gilbert* v. *California*, 388 U.S. 263, 273 n.3 (1967)) (noting that a witness's failure to repeat an out-of-court identification at trial "does not destroy its probative value" because "such failure may be explained by loss of memory or other circumstances" and "the principal danger of admitting

[12] The Court in *Green* noted (399 U.S. at 161 (emphasis added)) that none of the Court's Confrontation Clause decisions "requires excluding the out-of-court statements of a witness who is available and testifying at trial," and that most of its cases have involved "precisely the opposite situation" of statements "admitted in the absence of the declarant and without *any* chance to cross-examine him at trial."

hearsay evidence is not present since the witness is available at trial for cross-examination"); Model Code of Evidence, Comment to Rule 503(b) (1942) (noting, in approving introduction of out-of-court statement even where witness has suffered a loss of memory, that "both the adversary and the jury are in a more advantageous position to evaluate the evidence than they would be if the declarant were not subject to present cross-examination"); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 195-196 (1948) (stating view that there is "no real reason for classifying [an out-of-court statement] as hearsay" where the declarant is present as a witness at trial because "[the] [p]roponent is not asking the [t]rier [of fact] to rely upon the credibility of any one who is not present and subject to all the conditions imposed upon a witness"); cf. *Nelson* v. *O'Neil*, 402 U.S. 622 (1971) (no violation of Confrontation Clause where declarant is present at trial and testifies as to activities during period described in his out-of-court statement, but denies making statement and claims that substance of statement was false). In short, the dangers frequently associated with out-of-court statements are not present when the declarant is produced at trial and is subject to cross-examination.

Second, to give special treatment to memory loss in cases involving out-of-court statements would be to ignore the fact that in virtually *every* memory loss case, the memory loss will relate to some incident that occurred out of court. Specifically, unless a witness is offering only character testimony or an expert opinion based on hypothetical facts, his trial

testimony will necessarily involve out-of-court observations or statements.[13]

For example, a witness who observes a crime and identifies the defendant as the perpetrator may recall very little about the circumstances of the event, yet have a vivid impression that it was the defendant who committed the crime. There is very little difference between such a witness, who makes an in-court identification of the defendant but forgets most of the circumstances on which that identification is based, and a witness such as Foster, who remembers making an identification prior to trial, but forgets the details of the event that led him to make that identification.

The status of the two cases for Confrontation Clause purposes should be the same. In both cases, the witness who is recounting the pretrial event or statement is present in court, can be cross-examined by the defense, and can be observed by the jury. In neither case is the prosecution asking the jury to rely on the credibility of someone who has not been produced at trial. Furthermore, while the defense might ideally prefer to cross-examine a declarant when he first makes his out-of-court identification (or makes the out-of-court observation that leads to his in-court identification), this Court has explicitly rejected the proposition that contemporaneous cross-examination is required under the Confrontation Clause (*Green*, 399 U.S. at 160-161).[14] It therefore follows that

[13] Indeed, as *Fensterer* illustrates, even the opinion of an expert (or, for that matter, of a character witness) is likely to be based on specific events that occurred prior to trial.

[14] As this Court has recognized, the jury obviously cannot "be whisked magically back in time to witness a gruelling cross-examination of the declarant as he first gives his statement" (*Green*, 399 U.S. at 160).

there is little, if any, analytical difference for confrontation purposes between a witness's memory loss involving an out-of-court *statement* and his memory loss involving an out-of-court *event*.

Fensterer provides a useful illustration of the reason that Confrontation Clause analysis of a case involving memory loss should not depend on whether an out-of-court statement is involved. In *Fensterer*, the expert testified about the results of his out-of-court analysis, but he was unable to recall the circumstances that led him to reach that conclusion. In this case, Foster testified about the result of his prior identification, but he was unable to recall the circumstances that led him to make that identification. Although the identification evidence in this case and the expert testimony in *Fensterer* may stand differently for hearsay purposes, there is no reason to treat them differently for purposes of the Confrontation Clause. Cf. *Fensterer*, slip op. 1 (Stevens, J., concurring) (emphasis in original) (noting that the question in *Fensterer* concerned "the admissibility of an earlier out-of-court conclusion reached by a witness who disclaims any present recollection of the *basis* for that conclusion" and that the issue was therefore similar to the one reserved in *Green*). In each case, the defendant had the witness on the stand, under oath and in the presence of the jury, and was able to exploit the witness's failure of recollection to undermine the force of his testimony.[15]

[15] Although the court of appeals concluded (Pet. App. 12a-13a n.7) that *Fensterer* was inapplicable to out-of-court statements, it never explained the legal or logical basis for such a distinction. Indeed, the court of appeals' distinction of *Fensterer* is particularly unpersuasive in the present case, since Foster had a vivid recollection of his out-of-court state-

In that setting, it should make no difference, for Sixth Amendment purposes, whether the government is offering testimony regarding the witness's prior statement or testimony regarding the witness's prior observations or activities.

It is important to emphasize that our position does not necessarily result in the *admission* of out-of-court statements at trial merely because the witness is present in court. Rather, our position is simply that the Confrontation Clause does not *bar* the admission of otherwise admissible out-of-court statements where the declarant is present at trial and subject to cross-examination, even where the witness has suffered a memory loss concerning the statement or the underlying circumstances of the event in question. The admissibility of such statements should be governed by the rules of evidence. It should not be governed by a rigid constitutional formula that would foreclose courts and legislatures in both the state and federal systems from adopting evidentiary rules taking divergent approaches to the admission of evidence given by witnesses who have suffered some lapse of memory regarding the subject matter of their testimony. Cf. *Green*, 399 U.S. at 154-155 (noting that the issue was not whether prior inconsistent statements should be allowed, as a matter of evidence law, as substantive evidence but rather was the "consider-

---

ment to Mansfield and recounted it to the jury from the witness stand. See generally *Green*, 399 U.S. at 164 ("[T]he Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements * * *."); Morgan, *supra*, 62 Harv. L. Rev., at 196 (where witness affirms out-of-court statement under oath and subject to cross-examination, there is no "danger inherent in hearsay").

ably narrower" issue of whether such admission violates the Confrontation Clause).

4. The result of the court of appeals' holding in this case is that the constitutional significance of a witness's memory loss must be decided on a case-by-case basis in light of whether the cross-examination was "effective" or "meaningful" (Pet. App. 16a, 23a). But the court did not—and could not—formulate principles to identify what this Court has characterized as "some inevitably nebulous threshold of 'effectiveness'" (*Roberts*, 448 U.S. at 73 n.12).

Any rule that would make the constitutional inquiry turn on the extent of a witness's memory loss would be both unworkable and illogical. Frequently, eliciting a witness's memory loss concerning key facts or events represents the hallmark of successful cross-examination. As one authoritative trial practice treatise has explained, where a witness "testifies fully on direct examination" and then answers on cross-examination that he does not remember certain information, "the more times that counsel can make the witness say 'I don't remember' to her questions, the better will be the psychological effect, and the more forceful the argument that can be made in 'summing up.'" 3 A. Lane, *Goldstein Trial Techniques* § 19.58, at 97 (3d ed. 1986). Indeed, Wigmore describes several instances in which "[s]ome of the most effective exposures of false testimony in the history of trials have been achieved" by revealing a witness's memory loss. See 3A J. Wigmore, *Evidence* § 995, at 932-934 (Chadbourn rev. 1970). According to Wigmore, "[r]epeated instances of inability to recollect give the right to doubt the correctness of an alleged recollection of a material fact * * *. All the great cross-examiners have relied upon [that technique] * * *" (*id.* at 931-932).

See also *Fensterer*, slip op. 4 (indicating that the exposure of the expert's memory loss served to cast doubt on the reliability of his opinion); *Greene* v. *McElroy*, 360 U.S. 474, 497-498 (1959) (indicating that one purpose of cross-examination is to "uncover * * * lapses of recollection"); *Creekmore* v. *Dist. Court of Eighth Judicial Dist.*, 745 F.2d 1236, 1238 (9th Cir. 1984) (noting, in holding that the witness's memory loss at issue did not violate the Confrontation Clause, that the exposure of such memory loss "bespeaks the effectiveness of the cross-examination"); 3 D. Louisell & C. Mueller, *Federal Evidence* § 342, at 486 (1979) ("[c]ross-examination seems the ideal mechanism to bring to light" a witness's memory loss or impairment); Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 381 (1959) (noting that one of the purposes served by the right of confrontation is "to disclose * * * [a witness's] ability or lack thereof to recollect that which he observed"). In short, it is simply not possible to devise a workable test for determining when, if ever, the exposure of memory loss through cross-examination demonstrates a constitutional violation rather than an example of effective advocacy.

The futility of a case-by-case approach is illustrated by the numerous decisions of various courts of appeals that, while not adopting the per se standard suggested by Justice Harlan in *Green*, have rejected Sixth Amendment challenges where the witness's memory loss was far more extensive than that involved here. For example, in *United States* v. *Di Caro*, 772 F.2d 1314, 1325-1328 (7th Cir. 1985), cert. denied, No. 85-1007 (Mar. 24, 1986), the court held that, notwithstanding a witness's claim of complete amnesia concerning the events underlying his grand jury testimony, admission of that testimony

did not violate the Sixth Amendment because the declarant was questioned about his claimed amnesia and other matters relevant to his credibility. Similarly, in *United States* v. *Payne*, 492 F.2d 449, 453-454 (4th Cir.), cert. denied, 419 U.S. 876 (1974), the court of appeals upheld the admission of a prior statement of a witness, even though the witness claimed complete loss of memory about the circumstances of the statement and the facts related in it. The court pointed out that the case of complete memory loss differs only in degree from a case in which "a declarant has made a detailed earlier statement and at the trial, despite efforts to refresh his recollection, remembers only some, but not all, of the details." 492 F.2d at 454. The court concluded that there was no Sixth Amendment violation because the declarant was available for cross-examination about other events contemporaneous with the period to which his statement related, as well as possible bias or prejudice and the reasons underlying his memory loss. *Ibid.* And in *United States* v. *Insana*, 423 F.2d 1165, 1168 (2d Cir.), cert. denied, 400 U.S. 841 (1970), the court permitted the government to introduce a witness's prior statement when the witness at trial claimed a virtually complete lack of memory regarding the subject of his prior statement. The Confrontation Clause was satisfied, the court concluded, because the witness was at all times available for cross-examination. According to the court, the fact that the defendant "believes such examination would be fruitless [does not] render the witness unavailable for such examination." 423 F.2d at 1168.[16]

---

[16] Accord, *e.g.*, *United States* v. *Baker*, 722 F.2d 343, 347-349 (7th Cir. 1983) (no Confrontation Clause violation in admitting witness's prior statement identifying defendant,

Although many of these cases involved feigned rather than actual memory loss, a distinction for Sixth Amendment purposes between genuine and feigned memory loss would lead to the anomalous result that the jury would be precluded from hearing testimony from a witness who is presumably being truthful but would be permitted to hear evidence from one who is not. In any event, it is the jury's function to determine whether a witness's memory loss is genuine or feigned, and nothing in the Sixth

even though witness could not recall making that identification, since defendant was "free to cross-examine the out-of-court declarant" about the circumstances under which the statement was given), cert. denied, 465 U.S. 1037 (1984); *United States* v. *Russell*, 712 F.2d 1256, 1258 (8th Cir. 1983) (admission of grand jury testimony of witness claiming no recollection of event at issue did not violate Confrontation Clause since declarant testified and was subject to full and effective cross-examination); *Vogel* v. *Percy*, 691 F.2d 843, 845-848 (7th Cir. 1982) (admission of out-of-court statement as to which declarant suffered memory loss upheld where defendant was free to cross-examine declarant concerning circumstances under which it was made); *United States* v. *Distler*, 671 F.2d 954, 959 (6th Cir.) (introduction of prior statements of witnesses suffering memory loss did not violate Confrontation Clause because declarants testified at trial and were subject to cross-examination), cert. denied, 454 U.S. 827 (1981); *United States* v. *Rogers*, 549 F.2d 490, 498-500 (8th Cir. 1976) (extrajudicial statement properly admitted even though declarant could not recall its contents, where declarant was available for cross-examination on the question whether statement had been made), cert. denied, 431 U.S. 918 (1977); *United States* v. *Infelice*, 506 F.2d 1358, 1363 (7th Cir. 1974) (rejecting Sixth Amendment challenge based on witness's memory loss and noting that, for Confrontation Clause purposes, memory lapse is not "comparable" or "equivalent" to a witness's refusal to answer questions or to a denial of the right to examine him), cert. denied, 419 U.S. 1107 (1975).

Amendment requires that the trial court preempt that function by serving as a constitutional screen against the admission of prior statements of witnesses whose memory loss is judged to be genuine.

As the cases cited above indicate, the case-by-case approach to analyzing the Sixth Amendment significance of a witness's memory loss has led to substantial appellate litigation. Yet until the present case, the courts of appeals appear consistently to have rejected such challenges in cases involving memory loss far more severe than Foster's.[17] We submit that the approach to memory loss taken by Justice Harlan in *Green* would eliminate such litigation while in no way undermining the purposes served by the Confrontation Clause. Cf. *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), slip op. 11 (noting, in rejecting a rule requiring inquiry into unavailability whenever the government introduces a co-conspirator declaration, that such a rule has minimal benefits yet "automatically adds another avenue of appellate review in these complex cases"); *Roberts*, 448 U.S. at 73 n.12 (emphasizing importance of rules that "increas[e] certainty and consistency in the application of the Confrontation Clause").

B. Even If A Case-By-Case Inquiry Into Effectiveness Were Required, The Record Conclusively Demonstrates That Respondent Achieved Highly Productive Cross-Examination

Even assuming the court of appeals was correct in requiring a case-by-case analysis of the effectiveness of cross-examination, it nonetheless erred in finding

[17] One court of appeals has rejected the case-by-case approach to the Confrontation Clause analysis of cases involving memory loss and has adopted Justice Harlan's per se approach. *United States ex rel. Thomas* v. *Cuyler*, 548 F.2d 460 (3d Cir. 1977).

a Sixth Amendment violation in this case. The record in this case reveals that under any reasonable standard, respondent achieved "effective" and "meaningful" cross-examination of Foster, for two reasons: (1) Foster recalled numerous facts relevant to the case, and his recollection of those facts was explored at length on cross-examination; and (2) on matters as to which Foster had suffered a memory loss, respondent exploited his memory loss and used it to show the jury why Foster's out-of-court identification should be given little weight.

Specifically, Foster testified at great length concerning events contemporaneous with the assault and the circumstances under which he gave his out-of-court statement. Foster vividly recalled his actions upon arriving at work on the morning of April 12, 1982. He explained how he arrived at the prison, picked up his keys and a body alarm at the K unit, and went to the J unit where he made a pot of coffee, recorded the inmate count, and made other entries in the log book. He told how a superior called and instructed him to release the prisoners in the unit for breakfast, and he described how, in complying with the instruction, he unlocked each range of cells and went to the TV room to check it for contraband. J.A. 20-26, 33-34.

With respect to the assault itself, Foster testified that, after entering the J unit television room, he felt an impact on his head. Although he could not remember the identity of the person who struck him, he recalled that his assailant was armed with what seemed to be a pipe, that he jammed his right middle finger into his assailant's chest, and that, following the assault, he looked down and saw blood on the floor (J.A. 25-27, 34-35). Foster also recalled the precise injuries he sustained in the assault, including a fractured skull, cuts, bruises, a broken arm, loss of

hearing and memory, and injuries to his left eye and right middle finger (J.A. 28-29).[18]

In addition, Foster possessed a clear recollection of his conversation with Agent Mansfield in which he identified respondent. He specifically recalled telling Mansfield that "after I was hit I looked down and saw blood on the floor, and jammed my finger into Owens' chest, and said, 'That's enough of that,' and hit my alarm button" (J.A. 31). He also testified that at the time he spoke to Mansfield, there was no doubt in his mind about what had happened. Finally, he remembered that Mansfield had asked him to identify his assailant from a group of photographs and that he had selected respondent's photograph. J.A. 31-32.

As to those matters on which Foster suffered a failure of recollection, respondent brought out Foster's lapses in memory through detailed cross-examination (J.A. 33-48) and made effective use of them in summation (J.A. 80-85). For example, respondent's attorney elicited on cross-examination that Foster could not remember (1) seeing his assailant (J.A. 35), (2) telling Mansfield that he had been struck on the head six times (J.A. 45), or (3) making various statements attributed to him that were inconsistent with his identification of respondent as his assailant.[19] Foster also acknowledged on cross-examina-

---

[18] As the dissenting judge pointed out (Pet. App. 26a), the court of appeals erred in stating (*id.* at 15a n.9) that Foster's memory loss as to the events surrounding the assault was "actual and complete."

[19] Respondent was permitted to bring to the jury's attention the substance of those out-of-court statements attributed to Foster in which respondent was *not* identified. *E.g.*, J.A. 40-41 (cross-examination of Foster and extrinsic evidence of Foster's statement, recorded in medical records, in which he

tion that many people, including his wife, had told him that they had visited him during his hospital stay, but that he did not remember seeing or speaking to anyone except Agent Mansfield (J.A. 41-42).

During summation, respondent's attorney emphasized the evidence of memory loss that she had elicited during cross-examination. She maintained that Foster was struck from behind and, therefore, could not have seen his assailant. She also argued that by Foster's own admission, "he recall[ed] saying that [respondent] assaulted [him], but doesn't know why he said that. All of a sudden the name popped into his head, but he does not know why he identified him" (J.A. 80). In addition, she cited the prior statement by Foster, as reflected in medical records, in which he asked whether "Leo" was his assailant, and she pointed to evidence at the trial that there was an inmate in the J unit named Leo Damello (J.A. 83). She theorized, based on Foster's testimony, that "the evidence in this case shows, if anything, * * * that someone must have suggested [respondent's] name to Mr. Foster, because he did not see the assailant. There is no way that he would be able to identify him" (J.A. 81). These arguments undermining Foster's out-of-court identification would not have been possible if Foster had not been present at trial and subjected to thorough cross-examination.

---

inquired whether his attacker was "Leo"); J.A. 44 (cross-examination of Foster about statement to FBI Agent Mansfield that his attacker had a name that rhymed with "coma"); J.A. 59 (testimony of Dr. Butterfield that when Foster arrived at the hospital, he indicated that he did not know the identity of his assailant); J.A. 62 (testimony of Dr. Butterfield that medical records reflected Foster as having told medical personnel that "one of those clowns must have hit me").

In short, the jury had an adequate basis for assessing Foster's credibility and the accuracy of his pretrial statement identifying respondent as his assailant. In addition to being able to observe Foster's demeanor while testifying, the jury was afforded the opportunity to assess his ability to recall the events in question. Thus, even if the Sixth Amendment required that a witness's recollection be sufficient to ensure "effective" cross-examination, respondent's Sixth Amendment rights were not violated.[20]

---

[20] We note that there is some irony in the court of appeals' holding that the Confrontation Clause was violated in this case. As the evidence at trial demonstrated (J.A. 49-59), and as respondent conceded below (Owens C.A. Br. 6 n.1), Foster's memory loss was *caused* by the assault itself. And the Ninth Circuit, in finding that the violation of Fed. R. Evid. 801(d)(1)(C) was harmless, essentially concluded that there was substantial independent evidence—wholly apart from Foster's pretrial identification of respondent—that respondent committed the assault (Pet. App. 12a). Yet it is well established that "when confrontation becomes impossible due to the actions of the very person who would assert the right, logic dictates that the right has been waived." *United States* v. *Thevis*, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982). Accord, *e.g.*, *Reynolds* v. *United States*, 98 U.S. 145, 158 (1878); *Steele* v. *Taylor*, 684 F.2d 1193, 1201-1203 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983); *Black* v. *Woods*, 651 F.2d 528, 531-532 (8th Cir.), cert. denied, 454 U.S. 847 (1981). In this case, even putting aside Foster's pretrial identification, there is ample evidence linking respondent to the assault (see *Steele*, 684 F.2d at 1202 (applying preponderance standard); *Thevis*, 665 F.2d at 631 (applying clear and convincing standard)). While we do not urge waiver as an independent ground for rejecting respondent's Confrontation Clause argument in this case, the circumstances leading to Foster's memory loss underscore the point that it is not the government or the court that was responsible for any impairment of respondent's ability to engage in effective

II. THE ADMISSION OF FOSTER'S OUT-OF-COURT IDENTIFICATION DID NOT VIOLATE THE FEDERAL RULES OF EVIDENCE

In addition to ruling that the introduction of Foster's pretrial identification of respondent violated the Confrontation Clause, the court of appeals also held (Pet. App. 9a-11a) that the evidence was improperly admitted under Fed. R. Evid. 801(d)(1)(C). The court did not reverse on that ground because it found the error to be harmless. Although we agree with the court of appeals that any error in the application of Rule 801(d)(1)(C) was harmless, we disagree with the court of appeals on a more basic issue. We believe the court's ruling was incorrect on the merits and that the district court properly held that Foster's pretrial identification was admissible under the Rule.

1. Under Rule 801(d)(1)(C), a prior statement of identification is categorized as nonhearsay when "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement." As we have noted, Foster was available for, and subject to, cross-examination on every aspect of his direct testimony, including his testimony about having made a statement identifying respondent as his assailant. Rule 801(d)(1)(C) does not require that the declarant recall the details of the prior identification or the underlying event that gave rise to the identification, as long as he is subject to cross-examination—that is, as long as he is capable of understanding the proceedings, he testifies at trial,

---

cross-examination of Foster, a factor that has been identified as significant in Confrontation Clause analysis. See *Green*, 399 U.S. at 162; *id.* at 188-189 & n.22 (Harlan, J., concurring).

and the court does not improperly curtail the defendant's efforts to cross-examine him. Thus, even when witnesses have claimed a memory loss concerning the prior statement itself, the courts have held that the prior statement may nonetheless be admitted under Rule 801(d)(1). See, *e.g.*, *DiCaro*, 772 F.2d at 1323-1325; *United States* v. *Baker*, 722 F.2d at 347-348 & n.8.

The legislative history of the Rule is consistent with that interpretation. The discussion of the Rule on the floor of the House indicates that in enacting Rule 801(d)(1)(C), Congress contemplated that, when a witness makes a pretrial identification of the defendant and then refuses to acknowledge that identification in court, his prior statement should nonetheless be admissible through third parties. See 121 Cong. Rec. 31866-31867 (1975) (remarks of Rep. Hungate); *id.* at 31867 (remarks of Rep. Wiggins); *United States* v. *Elemy*, 656 F.2d 507, 508 (9th Cir. 1981).

2. Even if the Rule is construed to require that the declarant have sufficient recollection of prior events to be able to respond to detailed cross-examination, the Rule requires only that the declarant be subject to cross-examination "concerning the statement" of identification; it does not provide that the witness must also be subject to cross-examination concerning the "subject matter" of the statement.

A comparison with the language in Fed. R. Evid. 804(a) is particularly instructive. Rule 804(a), which adopts numerous exceptions to the hearsay rule based upon the declarant's "unavailability as a witness," defines "unavailability" to include situations in which the witness "testifies to a lack of memory *of the subject matter of his statement*" or "persists in refusing to testify *concerning the sub-*

ject matter of his statement." Fed. R. Evid. 804 (a)(2) and (3) (emphasis added). As one leading authority has observed, "[h]ad there been an intention in [Fed. R. Evid.] 801(d)(1) to require the witness to be cross-examinable concerning the matter asserted in his statement, Rule 804(a) demonstrates that the framers had the language to do it." 4 D. Louisell & C. Mueller, *Federal Evidence* § 421, at 213-214 n.64 (1980); see also *id.* § 419, at 179-180.[21] Accordingly, a witness's memory loss concerning events to which a pretrial identification relates does not preclude the admission of that out-of-court identification.

3. The most compelling answer to the court of appeals' construction of Rule 801(d)(1)(C) is that it would be squarely contrary to the purpose for which the Rule was devised. In 1975, shortly after the adoption of the Federal Rules of Evidence, Congress amended Rule 801(d)(1) by adding subsection (C) to permit the introduction of prior out-of-court identifications. See 4 D. Louisell & C. Mueller, *supra*, § 410, at 46-47; H.R. Rep. 94-355, 94th Cong., 1st Sess. 2-3 (1975). In discussing the purpose of the proposed amendment, the House Report observed (*id.* at 3) that out-of-court identifications are "particularly important in jurisdictions where there may be a long delay between arrest or indictment and trial." It noted that "[a]s time goes by, a witness' memory will fade and his identification will become less reliable." The proposed Rule therefore was designed to "[make] sure that delays in the criminal justice system do not lead to cases falling through because the witness can no longer recall the identity of the person he saw commit the crime." *Ibid.*; accord, S. Rep. 94-199, 94th Cong., 1st Sess. 2 (1975); 121 Cong. Rec. 31867 (1975); *United States* v. *Ingram*, 600 F.2d 260, 261 & n.* (10th Cir. 1979) (although witnesses did not identify defendant at trial, prior identification held admissible under Rule 801(d)(1)(C) because witnesses "were available at trial and were subjected to thorough cross-examination concerning their out-of-court identification statements"); *United States* v. *Lewis*, 565 F.2d 1248, 1251-1252 (2d Cir. 1977) (holding that, even though witness could not make in-court identification, prior out-of-court identification admissible under the Rule; the court observed that "[i]t seems clear both from the text and the legislative history of the amended Rule that testimony concerning extra-judicial identifications is admissible regardless of whether there has been an accurate in-court identification"), cert. denied, 435 U.S. 973 (1978); *United States* v. *Marchand*, 564 F.2d 983, 996 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978); 4 D. Louisell & C. Mueller, *supra*, § 421, at 205; cf. *United States* v. *O'Malley*, 796 F.2d 891, 899 (7th Cir. 1986) (although government witness recanted prior identification and denied that defendant participated in crime, prior out-of-court identification held admissible under Rule 801(d)(1)(C) because witness "was subject to cross-examination concerning his earlier statement made before trial").

As these sources reveal, Congress's very purpose in enacting Rule 801(d)(1)(C) was to permit the introduction of out-of-court identifications in instances where witnesses have suffered a memory loss by the

---

[21] This Court recently recognized that " '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' " (*Rodriguez* v. *United States*, No. 86-5504 (Mar. 23, 1987), slip op. 4, quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

time of trial. The construction of the Rule advocated by respondent and adopted by the court of appeals would completely undermine that purpose by holding that statements of pretrial identification are *precluded* in precisely those circumstances.

Thus, the district court was correct in admitting Foster's pretrial identification of respondent. Although Foster suffered a partial memory loss with regard to the assault itself, his recollection of his pretrial statement was vivid. Therefore, even if Rule 801(d)(1)(C) is construed to require that the declarant be able to recall the details of the out-of-court identification, that requirement was satisfied in this case, because Foster's clear recollection of his out-of-court identification of respondent permitted respondent to engage in meaningful and unimpeded cross-examination regarding that statement and the circumstances under which it was made.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROBERT H. KLONOFF
Assistant to the Solicitor General

JOHN F. DE PUE
Attorney

APRIL 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40308

RESPONDENT'S

BRIEF

PRESS OF BAR PRINTING, HATTERSVILLE, MD 20781 (301) 861-6665

Counsel for Respondent
(213) 736-1024
Los Angeles, California 90015
1441 West Olympic Boulevard
Loyola Law School
STANLEY A. GOLDMAN
(Appointed by this Court)
ALLAN IDES

BRIEF FOR RESPONDENT

For The Ninth Circuit
To The United States Court Of Appeals
On Writ Of Certiorari

JAMES JOSEPH OWENS,

Respondent.

v.

UNITED STATES OF AMERICA,

Petitioner.

OCTOBER TERM, 1988

Supreme Court of the United States

IN THE

No. 88-877

QUESTIONS PRESENTED

1. Whether an out-of-court identification is inadmissible hearsay under the Federal Rules of Evidence when the party who made the identification cannot, at the time of trial, recall the basis for that identification.

2. Whether the United States Court of Appeals for the Ninth Circuit properly concluded that an out-of-court identification made by an assault victim who could not recall the basis for the identification at the time of trial was, under the specific facts and circumstances presented, inadmissible and, therefore, inadmissible under the Confrontation Clause of the Sixth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

BOOKS AND TREATISES

OTHERS

STATEMENT OF THE CASE

1. Introduction. Although the questions presented in this case are closely tied to the specific underlying facts, the ultimate resolution of the controversy involves a fundamental question concerning the meaning of the Confrontation Clause. Shorn of its trappings, the argument between the government and defendant boils down to a basic disagreement on the meaning of that Clause. According to the government, the Confrontation Clause is satisfied by physical presence at trial (with a few narrow exceptions). As such, the clause protects nothing more than a right of trial procedure. According to defendant, although the Confrontation Clause does establish a procedural preference for cross-examination, that procedural right is designed to advance a particular substantive goal, namely, the creation of a basis upon which the trier of fact can assess the reliability and trustworthiness of testimonial evidence. In defendant's view, it is this substantive goal, and not any particular procedural device, that is at the heart of the Confrontation Clause.

2. Facts. On April 12, 1982, John Foster, a correctional officer at Lompoc Federal Penitentiary, was brutally assaulted by an individual wielding a metal pipe. Foster was beaten about his head and arm leaving him permanently disabled. At trial, Foster testified that he could not remember whether he had seen his assailant. J.A. at 27. He further testified that although he knew defendant quite well and recognized him from daily interactions in the prison, Foster had no recollection of defendant assaulting him. Id. at 35. With respect to the assault, Foster testified that he entered a T.V. room in the prison, felt an impact on his head and looked down and saw blood on the floor. Id. at 26-27, 35. Other than these bare details, Foster had no recollection of the incident.[1] See also id. at 116-117 (cross-

[1] In its brief, the government states that Foster "recalled that his assailant was armed with a piece of pipe." Brief for the United States at 8; see also Petition for a Writ of Certiorari at 6; Reply memorandum for the United States at 6 n.6. This is an extremely generous reading of Foster's testimony, the apparent purpose of which is to

examination). Importantly, Foster did not testify that although he had seen his assailant, he could not now remember who that person was. Rather, he testified that he could not remember whether, during the attack, he had seen his assailant at all.

Over defense counsel's objection,[2] Foster was permitted to testify that shortly before he was discharged from the hospital he met with Special Agent Tom Mansfield and that in response to a question from Mansfield, Foster stated that "Owens" had assaulted him. Id. at 31. Foster then picked defendant's picture from a photo-spread.[3] Id. at 32. Although Foster testified that there was no doubt in his mind at that time that defendant was his assailant, he could not at the time of trial recall why he had believed this. Id. at 31-32, 44-45. Nor was any evidence introduced indicating that Foster had explained the basis for the identification to Mansfield at the time it was made. In fact, Foster testified that he did not know whether he had based his

---

bolster the government's argument that Foster's testimony indicated a detailed recollection of the assault. In fact, Foster never testified that he saw the weapon; nor did he testify that he knew what the weapon was. The prosecutor did ask Foster to speculate on "what might have been used to hit [him] in the head." J.A. at 27. Foster replied, "Thinking back, it did have to be a pipe. That is about the right size. I have seen so many of them around, picked up so many that it seems to me that that is what it would be." J.A. at 27.

[2] Defense counsel raised four objections to the introduction of any out-of-court identifications by Foster: 1) lack of personal knowledge; 2) hearsay not coming within the exclusion provided by Federal Rule of Evidence 801(d)(1)(C); 3) violation of the Sixth Amendment Confrontation Clause; and 4) violation of the Fifth Amendment Due Process Clause. 1 Tr. at 3-6.

[3] The evidence showed that Foster and defendant were well acquainted with one another prior to the assault. Hence, the selection of defendant's likeness from the photo-spread added nothing to Foster's verbal response to the Mansfield question. It indicated only that Foster could recognize a photograph of defendant, a person with whom he was acquainted and whom he then believed to be his assailant.

identification on statements that somebody else may have made to him or upon his own perceptions of the assault. Id. at 45. Evidence at trial indicated that during his one month stay in the hospital, Foster was visited occasionally by prison personnel and every day by his wife. Foster could not remember any of these visits. Id. at 42.

Also over defense counsel's objection, Special Agent Mansfield testified consistently with Foster that on May 5, 1982, in response to a question posed by Mansfield, Foster stated that "Owens" [the defendant] was his assailant. Id. at 75-76. Mansfield's testimony, like Foster's reveals only that Foster believed, on the date of the interview, that defendant was his assailant. The basis for this belief is not in any manner evident from Mansfield's testimony. Apparently, Mansfield never asked Foster why Foster thought defendant was the assailant.

The District Court permitted Dr. Ted Bader, the prison physician, to testify that Foster, in a conversation with Bader, had identified defendant as his assailant. Id. at 69-72. Foster did not recall any such meeting with Bader. Id. at 28. Bader's testimony, like Foster's and Mansfield's, does not reveal the basis for Foster's identification of defendant.

The government also presented testimony from Dr. James B. Butterfield, the neurosurgeon who attended Foster during the latter's recuperation. Id. at 49. Dr. Butterfield testified that the nature of Foster's injuries could result in a gradual loss of memory or even a selective loss of memory. 2 Tr. at 161-70. This testimony permitted the jury to speculate whether Foster had in fact seen his attacker and, due to his injuries, had now lost all memory of that aspect of the assault. This, even though no evidence was introduced indicating that Foster had in fact seen his assailant.

Finally, the government makes a point of emphasizing the length of time Foster testified at trial. Brief for the United States at 36. Indeed, the prosecution did spend considerable time questioning Foster about events preceding the assault. J.A. at 20-26. However, with respect to the actual assault,

Foster had very little to say. With respect to whether he had seen the person who assaulted him, Foster had nothing to say. Id. at 26. That is the most relevant fact in this case.

3. Other Evidence. According to the government, the only questions presented in this case involve the admissibility of Foster's out-of-court identifications. Significantly, the government has not challenged the Court of Appeals conclusion that the constitutional harmless error standard could not be satisfied under the facts of this case. Hence, the facts recited above are the only facts directly relevant to this case. The government, however, has outlined the other evidence against defendant in an apparent effort to diminish the importance of Foster's out-of-court identifications and to otherwise color the case against defendant.

Not surprisingly, the government has characterized that evidence in a light most favorable to defendant's guilt. Yet, despite the finding of guilt, it does not necessarily follow that the jury believed or relied upon any of this other evidence. In a case of this sort, the question is not whether the other evidence was sufficient, but whether the challenged evidence has had an impact upon the jury's ultimate resolution of the case. Chapman v. California, 386 U.S. 18 (1967). The Court of Appeals held the error was not harmless. Pet.App. at 23a. Indeed, it is quite conceivable that the jury discounted all other evidence against defendant and convicted him based largely, if not solely, upon the out-of-court identification made by the victim. Clearly, the key evidence against defendant was that out-of-court identification. It was the thread that held together the prosecution's entire case.

In any event, as the government points out, testimony was elicited from four inmates, three of whom claimed to have witnessed the assault and one of whom claimed to have been the recipient of inculpating statements from defendant. There was also some circumstantial evidence. The Court of Appeals described the inmate testimony as follows:

> The remaining testimony inculpating appellant was all given by witnesses whose credibility the jury would have

> had every reason to question: prison inmates who had received lengthy prison terms for major felonies, who admitted having made prior statements under oath that were irreconcilable with their testimony at trial, who were quite likely aware that their parole dates might be advanced due to their cooperation with the government and whose testimony was internally inconsistent and inconsistent with each other's.

Pet.App. at 22a-23a. The circumstantial evidence had both inculpatory and exculpatory interpretations. In truth, because of the out-of-court identification it is not possible to know which of or to what extent this other evidence was credited by the jury.[4] In terms of the present proceeding that evidence is irrelevant.

4. The Court of Appeals Opinion. On appeal, defendant challenged the admissibility of Foster's out-of-court identification on three grounds. First, defendant argued the government failed to establish that Foster's testimony derived from his own personal knowledge as required by Federal Rule of Evidence 602.[5] Since Foster could not remember whether he had seen his assailant and since he could not remember why he later identified defendant as the assailant, there was no basis upon which to conclude that Foster's out-of-court identification satisfied the personal knowledge requirement of Rule 602. Next, defendant argued that Foster's out-of-court statement was hearsay and not within the exclusion provided by Federal Rule of Evidence 801(d)(1)(C).[6] Specifically, defendant argued

---

[4] The testimony of the inmate witnesses is summarized at pages 23-33 of Appellant's Opening Brief on Appeal.

[5] Federal Rule of Evidence 602 provides, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

[6] Federal Rule of Evidence 801(d)(1)(C) provides, "A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . one of identification of a person made after perceiving him."

that Foster's memory lapse rendered him unavailable for cross-examination as required by Rule 801(d)(1)(C). Finally, defendant argued that introduction of the out-of-court identification violated the Confrontation Clause of the Sixth Amendment.

The Court of Appeals did not resolve the issues raised with respect to Rule 602 and Foster's lack of personal knowledge. Pet.App. at 4a-7a. It did conclude, however, that Rule 801(d)(1)(C)'s requirement that the declarant be "subject to cross-examination concerning the statement" mandated that the declarant be available to testify as to the underlying basis for the out-of-court identification. Pet.App. at 9a-11a. In the absence of such availability, the Court reasoned, there would be no method for testing the reliability of the identification and, hence, Rule 801(d)(1)(C)'s hearsay exclusion would not be triggered. Pet.App. at 10a. Since Foster was not available within the meaning of the exclusion, introduction of his out-of-court identification was error. *Id.* However, applying the "more probable that not" standard, the Court of Appeals concluded this error was harmless. *Id.* at 11a-12a.

In assessing the potential Confronation Clause violation, the Court applied standards endorsed by this Court in *Ohio* v. *Roberts*, 448 U.S. 56, 65-66 (1980), *Dutton* v. *Evans*, 400 U.S. 74, 88-89 (1970) and *California* v. *Green*, 399 U.S. 149, 161 (1970). In this regard, the Court of Appeals observed that the admissibility of an out-of-court statement turned on whether the trier of fact has been given "a satisfactory basis for evaluating the truth of the [out-of-court] statement." Pet.App. at 13a (quoting *Dutton*, *supra*, 400 U.S. at 89 and *Green*, 399 U.S. at 161). The question was whether Foster's particular loss of memory had so undermined the truth evaluating process as to render the out-of-court identification inadmissible.

The Court of Appeals noted three potential dangers to the truth seeking function that could be triggered by a lack of effective cross-examination:

> First, misperception: the declarant may not have accurately perceived what he describes, or he may not have perceived it all. Second, failure of memory: at the time the declarant makes his statement his memory may not correspond completely and accurately with his earlier perceptions. Third, faulty narration: the declarant, in his statement, may fail, either deliberately or inadvertently, to convey what he remembers accurately.

Pet.App. at 14a. Applying these considerations to the facts and circumstances of this case, the Court noted that two of the above dangers were implicated by Foster's lack of memory—misperception and failure of memory:

> No one, including Foster, knows whether (1) Foster actually perceived his assailant, (2) if so, whether his perception of his attacker was accurate, and (3) whether at the time of his out-of-court identifications he had any memory of having observed that assailant. Not even the most skilled cross-examiner could elicit information that would help reduce the dangers of misperception or failure of memory.

Pet.App. at 16a. The Court of Appeals did not, however, hold that the Confrontation Clause was automatically violated because of the above concerns. The out-of-court identfication would still be admissible if the government could make a "showing of particularized guarantees of trustworthiness" as required by this Court in *Ohio* v. *Roberts*, 448 U.S. at 66. In order to make this determination, it was necessary to evaluate the four "indicia of reliability" described in *Dutton* v. *Evans*, 400 U.S. at 88-89 and endorsed in *Ohio* v. *Roberts*, 448 U.S. at 65-66.

> The Court of Appeals described those indicia as follows:
>
> An out-of-court declaration is reliable if (1) the out-of-court statement does not contain an express assertion about past fact, (2) the possibility that the out-of-court statement is founded on faulty recollection is extremely remote, (3) the circumstances under which the statement was made are such that it can be supposed that the declarant is not misrepresenting the facts, and (4) the declarant had personal knowledge of the matters asserted in the statement.

Pet.App. at 19a (citing *Dutton*, *supra*, 400 U.S. at 88-89 and *Roberts*, *supra*, 448 U.S. at 65-66). The Court of Appeals

concluded that at least three of the four indicia of reliability (and perhaps all four) were not present in this case:

> First, Foster's out-of-court identifications contained express assertions of past fact. Second, we cannot say that the possibility is extremely remote that the out-of-court statements were founded on a faulty (or even total lack of) recollection at the time those statements were made. Third, we have no idea whether Foster's statements were based on information provided by others and whether he may therefore have unintentionally misrepresented the facts. As to the fourth indicium, it is unclear whether Foster had personal knowledge of the matters asserted in his identification of appellant.

Pet.App. at 19a. The Court of Appeals, therefore, concluded, "In view of Foster's loss of memory we simply cannot determine on the basis of the record before us whether the out-of-court identifications are trustworthy." *Id.* Accordingly, introduction of the out-of-court identifications violated the Confrontation Clause.[7] The error was not harmless beyond a reasonable doubt. *Id.* at 21a-23a.

SUMMARY OF ARGUMENT

The issue in this case involves the intersection between the Confrontation Clause as it relates to the truth evaluation function of cross-examination and the Due Process Clause as it relates to the reliability of out-of-court eyewitness identifications. Both of these constitutional provisions are designed to

---

[7] The Court of Appeals also noted, but did not resolve, a potential Due Process violation. Citing *Manson* v. *Brathwaite*, 432 U.S. 98, 116 (1977) ("a very substantial likelihood of irreparable misidentification"), the Court stated, because of Foster's complete loss of memory, there may have been a substantial likelihood of irreparable misidentification in this case. Pet.App. at 20a n.13. Resolution of this point was unnecessary in light of the Court's holding with respect to the Confrontation Clause. *Id.* However, as will be discussed in the Argument section of this brief, there is an inextricable link between concerns that animate the Confrontation Clause and those that inform this Court's decisions regarding eyewitness identifications.

advance and protect the integrity of the fact-finding process. The specific issue in this case is whether a prior out-of-court identification is admissible against a defendant when the declarant cannot recall, and the prosecution is unable to demonstrate, the basis for that identification. Under such circumstances neither the trustworthiness nor the reliability of the out-of-court identification can be evaluated by the trier of fact. As a consequence, admission of the out-of-court identification violates both Confrontation and Due Process Clauses.

This Court has held a primary interest protected by the Confrontation Clause is the right to cross-examine one's accusers. At the heart of this preference is the express understanding that the function of cross-examination is to provide the trier of fact with a basis upon which to evaulate the reliability of the testimonial evidence submitted against the accused. Although cross-examination is the preferred means to that end, cross-examination is neither necessary nor, under all circumstances, sufficient to satisfy constitutional norms. The question in any case is whether the substance of the constitutional protection has been satisfied. That substance is based upon a combination of the reliability of the evidence and the opportunity for the trier of fact to assess that reliability.

Accordingly, this Court has never held that all out-of-court statements submitted as substantive evidence of guilt must be excluded. This Court has held, however, that absent some "indicia of reliability" the use of hearsay against criminal defendants violates the Confrontation Clause. Whether the Confrontation Clause has been violated depends upon the particular type of out-of-court statement at issue as well as upon the specific facts and circumstances presented. The linchpin for admissibility is reliability.

Nowhere is the evaluation of reliability more critical than with the case of an out-of-court identification. Eyewitness identifications are notoriously unreliable. Yet, they have been described as the single most convincing type of evidence to the average juror. As one jurist has noted, misidentification is "conceivably the greatest single threat to the achievement of

our ideal that no innocent man shall be punished." It is because of the potential unreliability of eyewitness identification, as well as the inordinate weight the average juror gives such evidence, that this Court has subjected eyewitness identification to a careful due process analysis that focuses on the reliability of the identification. In the context of an out-of-court identification, cross-examination is the critical method for exploring that question of reliability.

Federal Rule of Evidence 801(d)(1)(C) combines the constitutional concerns raised by the Confrontation Clause and the Due Process Clause by permitting introduction of an out-of-court identification only when the declarant is available for cross-examination regarding the statement. The most sensible and the most constitutionally defensible interpretation of this latter requirement is that the declarant must be cross-examinable with respect to the underlying basis for the identification. The out-of-court statement is, in fact, a composite of the circumstances surrounding the opportunity to view the criminal at the time the crime was committed and the circumstances leading up to and surrounding the identification. The reliability of the out-of-court identification can only be assessed after a full exploration of all these factors. In the absence of such an exploration, the identification must be presumed to be constitutionally unreliable.

Under the facts of this case, in which the witness legitimately cannot recall the basis for his out-of-court identification, Rule 801(1)(d)(C) is violated because the witness is unavailable for cross-examination; the Confrontation Clause is violated because the trier of fact is not given any basis upon which to evaluate the reliability of the identification; and the Due Process Clause is violated because factors directly related to a potential misidentification remain unexplored and unexplorable due to the witness' memory lapse.

ARGUMENT

1. The Nature Of The Issue Presented: An Intersection Between The Confrontation Clause And The Due Process Clause.

At issue in this case is the admissibility of an out-of-court identification made by a declarant who, at the time of trial,

recalls making the identification but cannot recall the basis for having done so. From the declarant's standpoint the identification could have been based solely upon information communicated to him by a third party. J.A. at 45. Indeed, there is no evidence that indicates the actual basis for the identification. Based on these factors, defendant claims that declarant was unavailable for cross-examination with respect to the accusatory identification. That claim arises in the specific context of the Confrontation Clause and Federal Rule of Evidence 801(d)(1)(C), the argument being that defendant was denied an opportunity to effectively cross-examine the declarant regarding the basis for and circumstances surrounding this accusatory out-of-court statement admitted at trial. In short, according to defendant, the out-of-court statment was not and could not be put to the test of the adversarial process.[8]

This Court has made it quite clear that no simple formula can resolve all questions involving the relationship between hearsay and the Confrontation Clause. *United States* v. *Inadi*, 106 S.Ct. 1121, 1125 (1986); *Ohio* v. *Roberts*, 448 U.S. 56, 64-65 (1980). The focus of any Confrontation Clause claim must be upon the precise evidentiary question presented. *United States* v. *Inadi*, 106 S.Ct. at 1125. Each hearsay exception or exclusion carries its own indicia of reliability and its own particular potentials for untrustworthiness. *Id.* at 1126-27. Hence, the application of the Confrontation Clause will be informed by the nature of the exception or exclusion at issue and by the specific facts underlying an application of that exception or exclusion. *Id.*

---

[8] As will be discussed *infra*, whether one characterizes the issue as one of confrontation or due process, the ultimate question involves the legitimacy of a conviction resting upon evidence bearing inadequate indicia reliability or elicited under circumstances in which reliability cannot be adequately assessed by the trier of fact. Compare *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality) (assessing reliability under the Confrontation Clause) with *id.* at 97-98 (Harlan, J., concurring) (assessing reliability under a due process model).

The precise context of the confrontation issues presented here involves the admissibility of an out-of-court eyewitness identification. Thus the claimed denial of confrontation is underscored by considerations of due process that arise in the context of eyewitness identifications. *Manson* v. *Brathwaite*, 432 U.S. 98 (1977); *Neil* v. *Biggers*, 409 U.S. 108 (1972); *Foster* v. *California*, 394 U.S 440 (1969); *United States* v. *Wade*, 388 U.S. 218, 228 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967); *Stovall* v. *Denno*, 388 U.S. 293 (1967). Similarly, Rule 801(d)(1)(C) should be construed in a manner that is consistent with these same considerations.

As such this case arises at an interaction between two constitutional protections, both of which are designed to advance and protect the integrity of the fact-finding process. From the perspective of the Confrontation Clause and in the absence of other indicia of reliability, the lack of an opportunity to explore the basis for an out-of-court statement through cross-examination leaves wholly unresolved the trustworthiness of the statement. Under a due process analysis, this lack of opportunity threatens a miscarriage of justice based upon a judicially recognized potential for mistaken eyewitness identifications. *United States* v. *Wade*, 388 U.S. 218, 228 (1967). In both contexts, the key concern is the reliability of the evidence and the overall integrity of the fact-finding process. *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980); *Manson* v. *Brathwaite*, 432 U.S. at 114.

Under the approach adopted by this Court, resolution of defendant's confrontation claim requires an examination of both the Confrontation Clause as it relates to the particular concerns associated with out-of-court eyewitness identifications and the hearsay exclusion under which the evidence was admitted. Cf. *United States* v. *Inadi*, 106 S.Ct. at 1126-27. As the Court of Appeals here correctly held, reliability is the necessary focal point of the inquiry.

2. The Underlying Premises Of The Confrontation Clause: Creating A Basis Upon Which To Evaluate The Reliability And Trustworthiness Of Testimonial Evidence

While it is literally true that no single case interpreting the Confrontation Clause can solve the myriad of questions arising

under that clause, it is equally true that a clear pattern of Confrontation Clause jurisprudence is discernible from the relevant case law. At the heart of this jurisprudence is a preference for face-to-face confrontation in the form of cross-examination. *Ohio* v. *Roberts*, 448 U.S. 56, 63 (1980); *Davis* v. *Alaska*, 415 U.S. 308, 315 (1974); *California* v. *Green*, 399 U.S. 149, 158 (1970); *Bruton* v. *United States*, 391 U.S. 123, 126 (1968); *Pointer* v. *Texas*, 380 U.S. 400, 406-07 (1965). The constitutional function of that cross-examination is to test the truth and accuracy of testimonial evidence introduced against a defendant in a criminal trial. *Ohio* v. *Roberts*, 448 U.S. at 63-64; *California* v. *Green*, 399 U.S. at 158.

Apropos of this functional approach, the Court in *Roberts* stated, "These means of testing accuracy [referring to techniques of cross-examination] are so important that the absence of proper confrontation at trial 'calls into question the ultimate integrity of the fact-finding process.'" *Ohio* v. *Roberts*, 448 U.S. at 64 (quoting *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973)).[9]

The presumption under the Confrontation Clause and within our adversarial system is that these legitimizing values are best advanced through cross-examination. However, the Confrontation Clause has not been interpreted literally to ban the introduction of all out-of-court statements. *Ohio* v. *Roberts*, 448 U.S. at 63. The preference for cross-examination can be overcome if the evidence to be introduced otherwise satisfies the concerns cross-examination was designed to promote. *Id.* at 66, 69, 72-74. Thus testimonial evidence not susceptible to cross-examination may be considered by the trier of fact under

---

[9] Thus, in essence, the Confrontation Clause represents a particular instance of the Bill of Rights' overall promotion of fairness and legitimacy in our adversarial system of criminal justice. Just as the Due Process Clause requires proof of guilt beyond a reasonable doubt to sustain a criminal conviction, *Jackson* v. *Virginia*, 443 U.S. 307 (1979), the Confrontation Clause requires that testimonial evidence submitted to meet that standard be susceptible to testing for its truth and accuracy.

appropriate narrowly defined circumstances that satisfy the underlying concerns for truth and accuracy that animate the Confrontation Clause. *Id.* at 66.

These general observations are confirmed by a careful examination of this Court's decisions in *Ohio* v. *Roberts*, *supra*, and *United States* v. *Inadi*, 106 S.Ct. 1121 (1986). While both cases eschew adoption of a specific, all encompassing framework for Confrontation Clause analysis, each case affirms the basic proposition that the search for reliability and trustworthiness is at the heart of the Confrontation Clause.

At issue in *Ohio* v. *Roberts* was the introduction into evidence of testimony garnered at a preliminary hearing. The prosecution claimed that the witness was no longer available at the time of trial. Hence, the specific issue before Court was whether, consistent with the Confrontation Clause, testimony taken at a preliminary hearing could be introduced as substantive evidence of guilt at a subsequent criminal trial.

The *Roberts* Court reaffirmed the principle that "the primary interest secured by [the Confrontation Clause] is the right of cross-examination." 448 U.S. at 63 (quoting *Douglas* v. *Alabama*, 380 US. 415, 418 (1965)). The Court explained that the constitutional purpose of cross-examination was to test the accuracy of the evidence introduced against the accused. 448 U.S. at 63-64 & nn. 5-6. According to the *Roberts* Court, implicit in the Confrontation Clause and its protections is the notion that cross-examination is the best method for testing accuracy and ensuring reliability. *Id. Accord California* v. *Green*, 399 U.S. at 158.

Having articulated the basic principles and presumptions that animate the Confrontation Clause, the Court noted two ways in which that clause "restrict[ed] the range of admissible hearsay." 448 U.S. at 65. First, the Confrontation Clause establishes a preference for face-to-face confrontation at the time of trial. *Id.* Accordingly, at least in the context of preliminary hearing testimony, unavailability was a prerequisite to admissibility. *Id.*

Next, assuming the witness is unavailable, preliminary hearing testimony could be introduced only if "it bears adequate 'indicia of reliability.'" *Id.* at 66. The *Roberts* Court made it clear that the "indicia of reliability" requirement was designed to ensure that admission of hearsay into evidence "comports with the 'substance of the constitutional protection.'" *Id.* The substance of the protection being an assurance that only reliable or trustworthy evidence (or at least evidence susceptible of being assessed for these qualities) will be admitted against the accused. The means to advance that substantive end will generally, but quite clearly not exclusively, be an opportunity to engage in effective cross-examination at the time of trial.

The *Roberts* Court concluded that the prosecution in the case before it had satisfied its burden of establishing unavailability. 448 U.S. at 75-77. The key question, therefore was whether the preliminary hearing testimony "bore sufficient 'indicia of reliability.'" *Id.* at 68. Again the Court emphasized that the purpose of this requirement was to assure that the contested evidence was elicited under circumstances indicating "substantial compliance with the purposes behind the confrontation requirement." *Id.* at 69 (quoting *California* v. *Green*, 399 U.S. at 166). Drawing an analogy with the facts in *Green*, the *Roberts* Court found that there were sufficient indicia of reliability in the case before it since counsel for defendant had extensively questioned the witness during the preliminary hearing. Under such circumstances the Court could comfortably conclude that "the trier of fact [had] a satisfactory basis for evaluating the truth of the prior statement." 448 U.S. at 73 (quoting *Mancusi* v. *Stubbs*, 408 U.S. 204, 216 (1972)). As such, the substantive goals of the Confrontation Clause had been met.

This Court's decision in *United States* v. *Inadi*, 106 S.Ct. 1121 (1986), underscores the importance of the "truth-evaluation" premise of the *Roberts* decision. At issue in *Inadi* was the admissibility of out-of-court statements made by an unindicted co-conspirator in furtherance of the charged conspiracy. The

defendant in *Inadi* did not demand a right to cross-examine the co-conspirator declarant on the substance of the out-of-court statements. In fact, the premise of defendant's argument was just the opposite: so long as the declarant was available to testify, the out-of-court statements were wholly inadmissible. In so arguing, the defendant in *Inadi* relied upon *Ohio* v. *Roberts* for the proposition that a showing of unavailability was a prerequisite for the admission of any out-of-court statement. This Court rejected that broad and somewhat illogical interpretation of *Roberts*. 106 S.Ct. at 1125.

According to the *Inadi* Court, *Roberts* did not provide "a general answer to the many difficult questions arising out of the relationship between the Confrontation Clause and hearsay." *Id.* The specific framework developed in *Roberts* was designed to resolve Confrontation Clause problems involving the admissibility of prior testimony. *Id.* at 1125-26. The unavailability requirement was appropriate in that context because, according to the *Inadi* Court, "former testimony often is only a weaker substitute for live testimony." *Id.* at 1126. "If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker verison." *Id.*

In short, in the limited context of prior testimony a requirement of unavailability advances the Confrontation Clause preference for cross-examination at the time of trial. Since the substance of the testimony is presumably identical there is no reason to override that preference in the absence of a showing that face-to-face confrontation is not possible.

Co-conspirator statements, on the other hand, have an independent evidentiary significance not found in prior testimony. "[S]uch statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court. . . . Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy." *Id.* Seen in this light, "[t]he

admission of co-conspirator's declarations into evidence thus actually furthers the 'Confrontation Clause's very mission' which is to 'advance the accuracy of the truth-determination process in criminal trials.'" 106 S.Ct at 1127 (quoting *Tennessee* v. *Street*, 471 U.S. 409, 415 (1985), quoting *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970)). Stated in the converse, an unavailability requirement in this context would retard the truth-determination process by eliminating valuable and reliable evidence from the trier of fact.[10]

Time and again this Court has affirmed the basic principles discussed above, namely, that the purpose of the Confrontation Clause is to provide a basis upon which to evaluate the reliability of testimonial evidence submitted against an accused. *California* v. *Green*, 399 U.S. 149 (1970), provides but another example.[11] In *Green*, this Court held that the Con-

[10] Of course, even in the absence of cross-examination if the out-of-court statements were reliable the Confrontation Clause would not be a bar to admissibility. *Ohio* v. *Roberts*, 448 U.S. at 66. The reliability of the out-of-court statements was not at issue in *Inadi*. 106 S.Ct. at 1124-25 n.3. Hence, that issue remained open for consideration by the Court of Appeals on remand. *Id.* at 1129 (Marshall, J., dissenting). The Courts of Appeals have split as to whether such statements are inherently reliable as a "firmly rooted" exception to the hearsay rule or whether a particularized assessment of reliability is required for each such statement. Compare *United States* v. *DeLuna*, 763 F.2d 897 (8th Cir. 1985) (particularized assessment); *United States* v. *Ordonez*, 722 F.2d 530 (9th Cir. 1983) (same); *United States* v. *Perez*, 702 F.2d 33 (2d Cir.) (same), *cert. denied*, 462 U.S. 1108 (1983), with *Boone* v. *Marshall*, 760 F.2d 117 (6th Cir. 1985) (firmly rooted); *United States* v. *Molt*, 758 F.2d 1198 (7th Cir. 1985) (same); *Ottomano* v. *United States*, 468 F.2d 269 (1st Cir. 1972) (same), *cert. denied*, 409 U.S. 1128 (1973). Under either approach, reliability remains the linchpin for admissibility.

[11] *Accord Mancusi* v. *Stubbs*, 408 U.S. 204, 216 (1972) (purpose of Confrontation Clause is to provide satisfactory basis for evaluation of truth of prior statement); *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality) ("mission of Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process"); *Douglas* v. *Alabama*, 380 U.S. 415, 419-20 (1965) (cross-examination necessary to "test the truth" of the out-of-court statement).

frontation Clause was not automatically violated by the introduction into evidence of prior testimony when the declarant was present at trial and available for "full and effective cross-examination." 399 U.S. at 158. In a detailed discussion of the Confrontation Clause, the Court explained that the "primary object" of the clause was to provide the accused an opportunity to cross-examine the witnesses against him. 399 U.S. at 157-58. Quoting Wigmore, the Court described cross-examination as the "greatest legal engine ever invented for the discovery of truth." 399 U.S. at 158. Based upon this premise, the Court concluded that if "the declarant is testifying as a witness and subject to full and effective cross-examination" the Confrontation Clause is not violated. *Id.* Full and effective cross-examination was described as that which would "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." *Id.* at 161. Thus, like the Court in *Roberts*, the Court in *California* v. *Green* saw cross-examination as performing an essential function in the adversarial process: providing a basis upon which the trier of fact could evaluate the truth and accuracy of the evidence submitted against an accused.

Under the facts presented in *Green*, the Court found no violation of the Confrontation Clause, in large part because declarant had been fully cross-examined at the time of the prior testimony. The Court, however, did take note of "a narrow question lurking" in the case before it. At the criminal trial the declarant claimed a loss of memory with respect to significant events to which he had earlier testified. The Court stated,

> Whether [the declarant's] apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture. . . . Its resolution depends much upon the unique facts in this record, and we are reluctant to proceed without the state court's views of what the record actually discloses relevant to this particular issue.

399 U.S. at 168-170. In a footnote the Court observed, "Commentators have noted that in such a case the opportunities for

testing the prior statement through cross-examination at trial may be significantly diminished." *Id.* at 169 n.18. In short, whether the Confrontation Clause had been violated would depend on facts in the record. Given the *Green* Court's earlier discussion of the Confrontation Clause, resolution of that question would depend on whether, under the specific facts and circumstances presented, the purported memory loss seriously undermined or eliminated the trier of fact's ability to evaluate the truth of the matters submitted into evidence.

On remand, the California Supreme Court concluded that despite declarant's purported memory loss, "[t]he prescribed purposes of the confrontation clause [were] fulfilled . . . ." *People* v. *Green*, 3 Cal.3d 981, 991, 479 P.2d 998, 1004, 92 Cal.Rptr. 494, 500 (1971). The California court did not arrive at that conclusion, however, until after it had assessed the record before it in terms of the impact of the memory loss on "the three-fold purpose of confrontation . . . (1) to insure reliability by means of the oath, (2) to expose the witness to the probe of cross-examination, and (3) to permit the trier of fact to weight his demeanor." 3 Cal.3d at 989, 989-91. In short, under the facts and circumstances presented the purported memory loss had not undermined those purposes, all of which, according to this Court in *California* v. *Green*, are directed toward the trier of fact's ability to evaluate the truth of the prior testimony.

In *California* v. *Green*, *Ohio* v. *Roberts* and *United States* v. *Inadi*, this Court recognized that the Confrontation Clause was designed to advance the truth-determination process under an adversarial system. The concepts of availability and unavailability as well as the technique of cross-examination are relevant only to the extent they advance that process. It is this end—providing a basis for the determination of truth and accuracy—and not any particular framework or methodology that is the "substance of the constitutional protection." Hence, although under the Confrontation Clause cross-examination at trial is the preferred means to that end, the ultimate question in any case is whether the trier of fact is given a "a satisfactory basis for evaluating the truth of the prior statement." *Ohio* v.

Roberts, *supra*, 448 U.S. at 73 (quoting *Mancusi* v. *Stubbs*, 408 U.S. 204, 216 (1972).[12] No set of mechanical rules can answer that question. As *Green*, *Roberts* and *Inadi* make clear the answer will depend on the nature of the testimonial evidence the government seeks to introduce at trial as well as the facts of the particular case. *Ohio* v. *Roberts*, *supra*, 448 U.S. at 66; *United States* v. *Inadi*, 106 S.Ct. at 1125-26; *California* v. *Green*, 399 U.S. at 168-70.

---

[12] Although the government cites *Ohio* v. *Roberts* several times in its brief, the citations are but passing references; the substance of *Roberts* is literally ignored. Considering the obvious importance of *Roberts* to the issues now raised this failure is odd to say the least. It is doubly curious since the Court of Appeals relied quite heavily on *Roberts*. The refusal to discuss *Roberts* is apparently premised on the theory that *Roberts* does not apply once the declarant takes the witness stand at trial. *See* Reply Memorandum for the United States at 2. Of course, *Roberts* never so limited its holding. And certainly the larger principles discussed in *Roberts* cannot be so easily circumscribed. In fact, leading experts in the area have interpreted *Roberts* as firmly establishing a functional approach for the Confrontation Clause, that function being the creation, through cross-examination, of a basis upon which to evaluate the reliability of an out-of-court statement.

> *Roberts* is highly significant as expositor of the meaning of the Confrontation Clause. The opinion makes express a point which had been only implicit and arguable before: The Clause requires that out-of-court statements offered against the accused have the "indicia of reliability" first required by *Dutton* and *Mancusi* even if the declarant is unavailable as a witness.

4 D. Louisell & C. Mueller, *Federal Evidence* § 418, at 150 (1980) (hereafter "D. Louisell & C. Mueller"). Louisell and Mueller further state that under *Roberts* unavailability "probably reaches as well those cases where the declarant appears in court but . . . pleads ignorance or lack of memory." *Id.* at 158. For a general discussion of *Roberts* and the functional approach to the Confrontation Clause, see *id.* at 146-67. Interestingly, the government describes the Louisell and Mueller treatise as a "leading authority." Brief for the United States at 42.

3. Eyewitness Identifications And Due Process: A Critical Necessity For Evaluating Reliability and Trustworthiness

Before applying the above considerations to the facts and circumstances of this case, it is necessary to focus upon considerations of due process that attach to the precise type of evidence now at issue: an out-of-court eyewitness identification. As was mentioned earlier, such evidence raises particular due process concerns because of a well recognized potential for convicting the innocent based upon a faulty identification. *Manson* v. *Brathwaite*, 432 U.S. 98 (1977); *Neil* v. *Biggers*, 409 U.S. 188 (1972); *Foster* v. *California*, 394 U.S. 440 (1969); *United States* v. *Wade*, 388 U.S. 218, 228 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967); *Stovall* v. *Denno*, 388 U.S. 293 (1967). As this Court stated in *United States* v. *Wade*, "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." 388 U.S. at 228 & nn.6 & 7.[13]

Despite the substantial potential for misidentification, jurors tend to place heavy reliance on eyewitness identification even when the testimony of the eyewitness has been thoroughly discredited and even when there is substantial evidence of innocence. *See* E. Loftus, *Eyewitness Testimony* 8-18, 135-36 (1979). Thus despite its potential unreliability, eyewitness testimony is apparently the single-most convincing type of evidence to the average juror. Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stanford L. Rev. 969, 970-71 & n.8 (1977). Accordingly, as succinctly stated by Judge McGowan of the District of Columbia Court of Appeals, misidentification is "conceivably the greatest single threat to the

---

[13] The unreliability of eyewitness evidence has been well documented. *United States* v. *Wade*, 388 U.S. 218, 228 & nn.6 & 7 (1967); *see generally* E. Loftus, *Eyewitness Testimony* (1979) (hereafter "E. Loftus"); A. Yarmey, *The Psychology of Eyewitness Testimony* (1979) (hereafter "Yarmey").

achievement of our ideal that no innocent man shall be punished." McGowan, *Constitutional Interpretation and Criminal Identification*, 12 Wm. & Mary L. Rev. 235, 238 (1970).[14]

As a consequence of these "vagaries" and the resulting dangers to the system of criminal justice, out-of-court identifications have been subjected to a careful due process analysis that focuses upon the reliability of the identification. *Manson* v. *Brathwaite*, 432 U.S. 98 (1977); *Neil* v. *Biggers*, 409 U.S. 188 (1972); *Foster* v. *California*, 394 U.S. 440 (1969). In the absence of some demonstration that the eyewitness identification is reliable, it is simply untenable as a matter of basic justice to permit a jury to consider such evidence.

At issue in *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), was a challenge to a pre-trial identification in which the individual providing the identification had been shown a single photograph which he then identified as that of the accused. Defendant argued that the identification procedure was unnecessarily suggestive and therefore inadmissible under the Due Process Clause of the Fourteenth Amendment. The government agreed that the identification procedure used was unnecessarily suggestive. *Id.* at 109. It argued, however, that despite that suggestiveness the identification was admissible.

The *Manson* Court agreed that under some circumstances such evidence was admissible. In so doing, the Court held that

[14] Not only does misidentification lead to convictions of the innocent. It also permits the guilty to roam free. As Justice Marshall stated in *Manson* v. *Brathwaite*, 432 U.S. 98 (1977):

> Indeed, impermissibly suggestive identifications are not merely worthless law enforcement tools. They pose a grave threat to society at large in a more direct way than most governmental disobedience of the law. . . . For if the police and public erroneously conclude, on the basis of an unnecessarily suggestive confrontation, that the right man has been caught and convicted, the real outlaw must still remain at large. Law enforcement has failed in its primary function and has left society unprotected from the depredations of an active criminal.

Id. at 127 (Marshall, J., dissenting).

"reliability is the linchpin in determining the admissibility of identification testimony . . . ." *Id.* at 114. The factors to be considered in assessing reliability include, "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *Id.*

The above factors relied upon by the *Manson* Court were first articulated by this Court in *Neil* v. *Biggers*, 409 U.S. 188 (1972). At issue in that case was the admissibility of an out-of-court identification made by a rape victim. Just as in *Manson*, the focus of the due process inquiry was on the reliability of the out-of-court identification. 409 U.S. at 199. Under the facts presented to it, the *Neil* Court was satisfied that the contested out-of-court identification was reliable in large part because of the victim's opportunity to observe her assailant at the time of the crime.

> The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately. She was no causal observer, but rather the victim of one of the most personally humiliating of all crimes. . . . The victim here, a practical nurse by profession, had an unusual opportunity to observe and identify her assailant. She testified at the habeas corpus hearing that there was something about his face "I don't think I could ever forget."

409 U.S. at 200-01. Similarly, in *Manson* v. *Brathwaite* the Court emphasized the importance of the witness' opportunity to observe the perpetrator of the crime in concluding that the out-of-court identification satisfied due process reliability concerns. 432 U.S. at 114-15.

Indeed, it is the opportunity to observe and the surrounding circumstances of that observation that in large part establish

the reliability of the out-of-court identification.[15] Other factors such as the witness' degree of confidence and the accuracy of a prior description apparently bear little or no relationship to the acccuracy of the identification. Indeed, certainty is more a function of a combination of memory loss and unconscious modifications of memory caused in part by suggestions from outside sources and by various other subtle factors that "enhance" the memory.[16] In short, reliability is a product of the individual's opportunity to observe the criminal at the time of the crime and the absence of factors such as stress, violence, delay and suggestability, all of which may affect or even alter the memory of what was observed.

As was stated at the outset, this case arises at an intersection between the above constitutional concerns for due process in

---

[15] E. Loftus, *supra*, note 13 at 20-51; Yarmey, *supra*, note 13, at 3, 36-52; Note, *Did Your Eyes Deceive Your? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stanford L. Rev. 969, 976-82 (1977) (hereafter "*Unreliability of Eyewitness Identification*"). In the Stanford note, the author points out that psychological studies have demonstrated that the ability to observe and accurately identify a person is complicated by perceptual selectivity of the human brain, poor observation conditions, and the fact that the situation is stressful. *Id.* (citing and discussing various studies). With respect to observation, the author states,

> Crimes in which the primary evidence is an eyewitness identification characteristically are brief, fast-moving events; the victim and witnesses consequently will have difficulty getting a sufficiently good "look" to allow them to process enough visual features of the event and the offender to make a reliable subsequent recognition. This durational constraint has particularly deleterious effects when the crime occurs suddenly, and the witness is thus unprepared to focus perceptual attention on the important features of the event.

Id. at 978.

[16] E. Loftus, *supra* note 13, at 54-87. Professor Loftus also mentions the phenomenon of "unconscious transference," in which a "a person seen in one situation is mistakenly remembered by a witness as being seen in a different situation." *Id.* at 136, 142-44. See also *Unreliability of Eyewitness Identification*, *supra*, note 15, at 982-29 (citing and discussing studies).

the context of eyewitness identifications and the earlier discussed considerations that arise under the Confrontation Clause. If, as this Court's cases indicate, the primary object of the Confrontation Clause is to provide the trier of fact an adequate basis to evaluate the truth and accuracy of testimonial evidence submitted against the accused, then it would seem that the clause takes on a special meaning in the context of an out-of-court identification. Such evidence has been determined to be particularly dangerous to the system of criminal justice and admissible only under circumstances specifically indicative of its reliability. A prime consideration in that reliability assessment is whether the witness had an adequate opportunity to observe the perpetrator of the crime. Cross-examination in this context, therefore, provides a critical method for testing not only the trustworthiness of the statement, but also its reliability in terms of the grave potential for misidentification.

4. The Congressional Response: Federal Rule Of Evidence 801(d)(1)(C)

Federal Rule of Evidence 801(d)(1)(C) excludes from the definition of inadmissible hearsay[17] a narrow range of out-of-court identifications:

> A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . one of identification of a person made after perceiving him.

Thus, assuming other rules of evidence are satisfied, an out-of-court identification is admissible if it meets the above requirements and if its admission is consistent with the Constitution. In fact, Rule 801(d)(1)(C) seems to have been designed to

---

[17] Federal Rule of Evidence 801(c) defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is, of course, generally inadmissible. *See* Federal Rule of Evidence 802.

ensure compliance with the constitutional guarantees of confrontation and due process. In terms of this case, the most sensible and defensible interpretation of Rule 801(d)(1)(C) is that a declarant is not available for cross-examination if the declarant cannot legitimately recall the basis for the out-of-court identification. This construction of the rule is consistent with the language of the rule as well as with the definition of unavailability found in Rule 804(a)(3); moreover, such a construction has the added benefit of avoiding unnecessary clashes with the Confrontation and Due Process Clauses.

As the language of the rule indicates, a fundamental component of Rule 801(d)(1)(C) is the requirement that the declarant be subject to cross-examination concerning the out-of-court statement. 4 D. Louisell & C. Mueller, *Federal Evidence* § 421 at 212 (1980) (hereafter "D. Louisell & C. Mueller"). This component of the rule is something more than an empty formalism that the declarant be physically present at trial. *Id.* ("[T]he cross-examination requirement should not be construed as an empty formalism satisfied by the mere fact that the identifier sits still long enough for the defense to pose questions.") Indeed, the declarant must both testify *and* be "subject to cross-examination concerning the statement . . . ." The purpose of this latter requirement is to provide the opposing party with an opportunity to inquire into whether the declarant made the out-of-court identification, and, if so, the circumstances surrounding the identification. 4 D. Louisell & C. Mueller at 212-13; 4 Weinstein and Berger, *Weinstein's Evidence* at 801-176 to 801-178 (1985) (hereafter "Weinstein & Berger"). The cross-examination requirement is also designed to provide the accused an opportunity to explore the underlying basis for the identification. 4 Weinstein & Berger at 801-176 to 801-178.

Professors Louisell and Mueller explain that whether the cross-examination requirement of Rule 801(d)(1)(C) is satisfied turns on two points. The first involves the extent to which defense counsel actually delves into the "circumstances and motives surrounding the prior statement." 4 D. Louisell & C.

Mueller at 213. The second, and the one pertinent to the present case, involves

> the extent to which the answers of the identifier, whether framed as denials of his prior statement, claims of lack of memory about it, or refusal to answer questions about it, shed light upon those circumstances and motives. If a good faith effort at cross-examination fails to expose the circumstances and motives because of the uncooperative conduct of the witness on the stand, Rule 801(d)(1)(C)'s cross-examination requirement should be deemed unsatisfied.

Id. The authors further explain that "the fullness of [declarant's] replies to cross-questions about the prior statement is important because there may have been suggestive influences at work on the prior occasion which led to a false certainly or even a false memory, and reasonably complete replies may bring these to light." *Id.*

Judge Weinstein, in his treatise on the Federal Rules of Evidence, agrees with the points raised by Louisell and Mueller. 4 Weinstein & Berger at 801-176 to 801-178. He goes on, however, to address the problems that arise when a declarant cannot recall the underlying basis for the out-of-court identification. According to Judge Weinstein, such a circumstance, no less so than when a declarant cannot recall the out-of-court statement, calls into question "the adequacy of cross-examination and the right of confrontation." *Id.* at 801-176. In this regard, Judge Weinstein asks,

> "Can there be adequate cross-examination of the person making the identification about the basis of the identification and the reasons leading up to the identification if the witness denies everything, or claims to have no present knowledge about the circumstances of the previous identification, and no recollection of the defendant at the time the crime occurred?"

Id. Weinstein suggests a negative answer: "[I]f the identifying witness claims no memory of the events defendant is charged with and cannot testify to the basis for the identification, his cross-examination is of no value since there will be no way of

evaluating the probative force of the identification." *Id.* at 801-178.

Put in terms of the Confrontation Clause model discussed earlier, under such circumstances the trier of fact is given no basis upon which to evaluate the truth or accuracy of the out-of-court statement; from a due process perspective, when the out-of-court statement is an eyewitness identification the matter is further complicated by the inability of the defendant to explore and expose vital factors that may have affected or altered the identification. By requiring an opportunity for effective cross-examination, the rule advances those constitutional considerations and, in general, should obviate the necessity for turning to the Constitution to resolve the question of admissibility.[18]

In fact, when one takes into account the due process considerations associated with out-of-court identifications (e.g., the opportunity to observe the criminal at the time of the act), it is difficult, if not impossible, to separate the out-of-court statement from the underlying basis for that statement. The two are inextricably intertwined; cross-examination "on the statement" cannot be complete without an opportunity to explore the basis upon which the identification was made.

Although Professors Louisell and Mueller are in clear agreement with Judge Weinstein with respect to the critical need for

---

[18] Professors Richard Lempert and Steven Saltzburg, in a discussion of the Federal Rules of Evidence, have described concerns similar to those expressed by Judge Weinstein:

> The case against an exception [from the rule that hearsay is inadmissible] is considerably stronger where the witness denies making the inconsistent statement or asserts he has no memory of it. If the denial is coupled with a failure to remember the incident described or with a claim to have never known the facts of the incident the opposing attorney has no way of testing the truth of the inconsistent statement on cross-examination. One cannot extract from a witness the details of an incident which he claims to have forgotten or to have never known about in the first place. Virtually all the hearsay dangers are present.

R. Lempert & S. Saltzburg, *A Modern Approach to Evidence* 512 (2d ed. 1982).

an opportunity to engage in effective cross-examination, they disagree with him in one respect. According to Louisell and Mueller, "Rule 801(d)(1)(C) does not require the identifier to be cross-examinable upon the matter asserted in his prior statement." 4 D. Louisell & C. Mueller at 213. Under this approach the declarant need only be available for cross-examination on whether declarant made the statement and, if so, the facts and circumstances surrounding the making of the statement.[19] The authors do not explain how the circumstances surrounding the making of the identification can be separated from the basis upon which the identification is made. However, this lack of an explanation may be explained by the primary concern Louisell and Mueller seem to be addressing with their narrow construction of Rule 801(d)(1)(C), namely, the situation in which a witness is unable to make an in-court identification. *Id.* at 214. Still, even if one accepts that the declarant need not make an in-court identification as a prerequisite to the admission of an out-of-court identification, it does not follow that a neat separation must or even ought to be made between the out-of-court identification and the grounds upon which it was made.

In fact, Louisell and Mueller seem to recognize this precise point. In an earlier discussion of Rule 801(d)(1)(C), the authors warn, "Care should be taken, however, to insure that statements received under Rule 801(d)(1)(C) have some basis in the personal experience of the identifier, for it would pervert the Rule to use it as a means to admit a statement by an identifier embodying yet another statement made or information supplied to the identifier by remote sources." 4 D. Louisell & C. Mueller at 208. Hence, where the lack of memory leaves unexplored and unexplorable the question of personal knowledge, Louisell and Mueller suggest in strong terms that the rule and

---

[19] This Court makes no such separation in its due process analysis of out-of-court identifications. *See Manson* v. *Brathwaite*, *supra*, 432 U.S. at 114.

the policies underlying it would not be served by introduction of the out-of-court statement.[20]

Next, although Louisell and Mueller interpret Rule 801(d)(1)(C) somewhat more narrowly than Judge Weinstein (with the above caveat on personal knowledge that seems to encompass many of the concerns expressed by Judge Weinstein and Professors Lempert and Saltzburg), they recognize that even if the rule is not violated when a witness has a memory loss regarding the underlying events, the Confrontation Clause may be. 4 D. Louisell & C. Mueller at 216, 229-35, 248-50. According to Louisell and Mueller:

> Assuming the absence of constitutional obstacles to the identifier's in-court testimony, there are still potential constitutional difficulties in the use of his pretrial identification if the defense opportunity to confront the identifier at trial is constitutionally inadequate. Such inadequacy might appear if the identifier were to claim at trial to be unable to say whether the accused was the culprit . . . .

---

[20] This particular concern raised by Louisell and Mueller points to the close relationship between Rule 801(d)(1)(C) and Federal Rule of Evidence 602 which provides: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." *See* M. Graham, *Handbook of Federal Evidence* 384-88, 385 (1981) (noting close relationship between personal knowledge requirement and hearsay). The idea is that evidence must be based upon the firsthand knowledge of the individual purporting to be the source of the information. *United States* v. *Lang*, 589 F.2d 92, 97-98 (2d Cir. 1978). According to Judge Weinstein:

> Rule 602 provides that a witness may testify only about matters of which he has firsthand knowledge: the testimony must be based upon events perceived by the witness through one of the physical senses. The rule—an extension of the law's preference that decisions be based on the best evidence available—is grounded in the realization that the possibility of distortion increases with transfers of testimony, and that consequently the most reliable testimony is that which is obtained from the witness who himself perceived the event.

Weinstein & Berger paragraph 602[01], 602-2 to 602-3 (1985).

Id. at 248. The key to determining whether the Confrontation Clause had been violated will be found in the facts of each case and most particularly the extent of the memory loss as it relates to "the defense opportunity to cross-examine at trial." *Id.* at 230.[21] In this regard, Louisell and Mueller state:

> The extent of the claimed memory loss of the witness regarding the underlying facts would seem to be the most important element in assessing the adequacy of the defense opportunity to cross-examine at trial. . . . If . . . the witness claims to have forgotten nearly everything about the underlying events, defense cross-examination will be essentially stymied. . . . Where he affirms having made the statement, and is at least cross-examinable on the reasons why he made it, defense cross-examination may not be too much frustrated.

Id. Hence, reading the Confrontation Clause in conjunction with Rule 801(d)(1)(C), Louisell and Mueller arrive at the precise conclusion asserted by defendant here: a witness who cannot testify as to the basis for an out-of-court identification is not available for cross-examination.[22]

Finally, although in the end, Louisell and Mueller appear to arrive at the same conclusion as Judge Weinstein, the straightforward interpretation of Rule 801(d)(1)(C) suggested by Judge Weinstein is more consistent with other definitions of hearsay found in the Federal Rules of Evidence and on that basis alone would seem preferable. For example, Federal Rule

---

[21] In a similar vein, Louisell and Mueller recognize the importance of cross-examination in the context of the due process concerns associated with out-of-court identifications: "In order to ascertain whether Due Process does require exclusion, it seems to be constitutionally important that the identifier be adequately cross-examinable at trial about his pretrial identification, for it is here that the defense may best be able to develop the facts about what occurred during pretrial procedures, and the impact which the circumstances may have had upon the identifier." 4 D Louisell & C. Mueller at 245-46.

[22] *See also* 4 D. Louisell & C. Mueller § 418, at 150-67 (discussing a functional approach to the Confrontation Clause).

of Evidence 804(a)(3) defines "unavailability as witness" to include those "situations in which the declarant . . . testifies to a lack of memory of the subject matter of his statement." Although Rule 804(a)(3) does not include a cross-reference to Rule 801(d)(1)(C), it would be more than somewhat ironic that a witness with a memory loss would be deemed unavailable under Rule 804(a)(3), but available under Rule 801(d)(1)(C). In a passage rejecting such an illogical approach, Judge Weinstein states:

> [i]t would seem that the prior statement should not be included under 801(d)(1)(A) if the judge finds that the witness genuinely cannot remember, and the period of amnesia or forgetfulness is crucial as regards the facts in issue. This result would be . . . in keeping with Rule 804(a)(3) which includes among the situations in which a witness is unavailable that arising when "he testifies to a lack of memory of the subject matter of his statement." Although the rules nowhere state that Rule 804(a)(3) refers back to Rule 801, the reasoning of Rule 804(a)(3) would mean that declarant was not available at trial—a precondition for the exclusion of Rule 801 statements from hearsay.

4 Weinstein & Berger at 801-120 to 801-121.

Oddly enough, although Louisell and Mueller reject reliance on Rule 804(a)(3)'s definition of unavailability with respect to a memory loss that relates to the underlying basis for an out-of-court statement (*see* 4 D. Louisell & C. Mueller at 180, 213-14 n.64), they rely on that same provision to argue that a witness with a memory loss with respect to the statement itself is unavailable as a witness.

> As a matter of construction, it can be argued that in such circumstances the cross-examination requirement of Rule 810(d)(1) is *not* satisfied, hence that prior statements covered by subdivisions (d)(1)(A) or (d)(1)(B) cannot be given substantive effect, and that prior statements offered under subdivision (d)(1)(C) must be excluded altogether. The argument proceeds this way: The matter upon which Rule 801(d)(1) requires the witness to be cross-examinable is the making of the prior statement. But Rule 804(a) instructs that a person is "unavailable as a witness" where

> he claims a "lack of memory" or "persists in refusing to testify" concerning certain matters. If a person who claims a lack or [sic] memory or refuses to testify concerning his prior statement can yet be said to satisfy Rule 801(d)(1)'s cross-examination requirement, then we reach the somewhat surprising and incongruous result that a person described by one Rule as "unavailable as a witness" is nevertheless considered by another Rule to be "subject to cross-examination."

4 D. Louisell & Mueller at 180-81. Of course, this same result is equally incongruous with respect to the basis for the out-of-court identification. A witness is either available or not.

In short, the "subject to cross-examination" requirement of Rule 801(d)(1)(C) should be deemed unsatisfied when the declarant cannot legitimately recall the basis for the out-of-court identification. This construction is consistent with the language of the Rule, the definition of unavailability found in Rule 804(a)(3) and with the Confrontation and Due Process Clauses.[23]

---

[23] Although the Court of Appeals agreed with the above construction of Rule 801(d)(1)(C), it held that admission of Foster's out-of-court identifications were harmless under the "more probable than not" standard. Pet.App. at 11a-12a. If the Court of Appeals made any error in this case it was on that latter conclusion. When one considers the impact on a jury of an eyewitness identification by a sympathetic victim such as John Foster, it is difficult, if not impossible, to conclude that the error was harmless even under the more probable than not standard. Foster's testimony was the thread that held the prosecution's case together. Indeed, the Court of Appeals seemed to recognize this in its discussion of constitutional harmless error. Pet.App. at 21a-23a. Respondent contends, and contended below, that the most appropriate resolution of this case is under Rule 801(d)(1)(C), coupled with a conclusion that the error was not harmless. Certainly, when a Federal Rule of Evidence appears to be designed to address constitutional concerns, as this rule clearly is, the harmlessness analysis should be applied with some consideration for avoiding the necessity of deciding a constitutional issue.

5. The Government's Theory Of Confrontation: A Formalistic Rule Devoid Of Substantive Content

The government urges this Court to adopt a narrow and mechanical construction of the Confrontation Clause. According to the Government,

> [T]he physical presence of the witness satisfies the Confrontation Clause as long as (1) the scope of cross-examination has not been impermissibly retricted by the trial court or by statute; (2) the witness is physically and mentally capable of understanding the proceedings and engaging in a question and answer diaglogue; and (3) the witness does not assert his Fifth Amendment privilege or otherwise refuse to testify or be sworn.

Brief for the United States at 18. In so arguing, the government relies primarily on Justice Harlan's concurring opinion in *California* v. *Green*, 399 U.S. 149, 172-89 (1970) and to a lesser extent on two recent decisions by this Court, *Delaware* v. *Fensterer*, 106 S.Ct. 292 (1985) (per curiam), and *Pennsylvania* v. *Ritchie*, 107 S.Ct. 989 (1987) (plurality), neither of which have anything to do with the Confrontation Clause as it relates to the introduction of out-of-court statements. Significantly, the government virtually ignores this Court's decision in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), a decision widely recognized as articulating the general principles to be applied in cases involving the relationship between the Confrontation Clause and various hearsay exceptions or exclusions.[24] Finally, as will be demonstrated below, the government's theory of the Confrontation Clause suffers from its own internal illogic.

A. Justice Harlan's Concurring Opinion In *California* v. *Green*

In asking this Court to adopt the approach outlined by Justice Harlan in *Green*, the government has made two fundamental errors. First, the government fails to recognize that this Court has both implicitly and explicitly rejected Justice Harlan's interpretation of the Confrontation Clause. Second, in describing the approach suggested by Justice Harlan, the government fails to note that although Justice Harlan in *Green* described a narrow model of the Confrontation Clause, in that same opinion he embraced an approach to due process that encompassed the same concerns this Court has otherwise considered under the rubric of confrontation.

[24] *See*, e.g., 4 D. Louisell & Mueller at 146-50, 150-67 (appraising *Roberts* as firmly establishing the Confrontation Clause as a functional device for ensuring a basis upon which the trier of fact can evaluate the truth and accuracy of an out-of-court statement).

The premise of Justice Harlan's concurring opinion in *California* v. *Green*, 399 U.S. at 172-89, was that courts and commentators had incorrectly equated the concept of confrontation with the process of cross-examination. *Id.* at 173-74. From this premise, coupled with a discussion of historical materials, Justice Harlan concluded, "the Confrontation clause of the Sixth Amendment reaches no farther than to require the prosecution to *produce* any *available* witness whose declarations it seeks to use in a criminal trial." *Id.* at 174. Justice Harlan specifically rejected the notion that the clause was designed to ensure an opportunity to cross-examine witnesses. *Id.* at 177.

Hence, under the approach advocated by Justice Harland, the Confrontation Clause would not be violated if the government produced a witness who had a complete loss of memory with respect to an out-of-court statement previously made by that witness and introduced against the accused as substantive evidence of guilt. *Id.* at 188. Admittedly, the physical presence model now suggested by the government is quite consistent with this aspect of Justice Harlan's theory of the Confrontation Clause. However, that theory was implicitly rejected by this Court in *California* v. *Green*, 399 U.S. at 153-64 (primary object of Confrontation Clause is to permit cross-examination of witnesses against accused), and expressly rejected by this Court in *Ohio* v. *Roberts*, 448 U.S. 56 (1980).

In *Ohio* v. *Roberts*, this Court reaffirmed the principle that the right of cross examination was a "primary interest" secured by the Confrontation Clause. 448 U.S. at 63. The *Roberts*

Court also endorsed the "indicia of reliability" approach first suggested by Justice Stewart in *Dutton* v. *Evans*, 400 U.S. 74 (1970), as the appropriate framework from which to assess Confrontation Clause claims involving the introduction of hearsay. Before doing so, however, the majority of the Court surveyed a plethora of alternative approaches. As the Court phrased it, "The complexity of reconciling the Confrontation Clause and the hearsay rules has triggered an outpouring of scholarly commentary." 448 U.S. at 66 n.9. In that survey of authorities, the Court included Justice Harlan's *Green* opinion as among those "theories that would relax constitutional restrictions on the use of hearsay by the prosecutor." *Id.* at 67 n.9. The Court described the indicia of reliability approach which it had adopted as a middle course between theorists such as Justice Harlan and others who would sharply curtail the use of hearsay. *Id.* at 68 n.9. The Court then reaffirmed that middle course and stated:

> Our reluctance to begin anew is heightened by the Court's implicit prior rejection of principle alternative proposals, see *Dutton* v. *Evans*, 400 U.S., at 93-100 (concurring opinion), and *California* v. *Green*, 399 U.S., at 172-189 (concurring opinion) . . . .

Id. The concurring opinion in *Green* to which the *Roberts* Court referred and, as a consequence of that reference, rejected was that of Justice Harlan.

Second, although in *Green* Justice Harlan proposed a narrow reading of the Confrontation Clause, in that same opinion he endorsed a due process model virtually identical to the "indicia of reliability" approach adopted in *Roberts* under the rubric of the Confrontation Clause. Several times in his *Green* opinion Justice Harlan referred to the due process protection against convictions based upon unreliable or untrustworthy testimonial evidence. 399 U.S. at 184 (restrictions on the "abuse of hearsay testimony" part of due process right to reliable and trustworthy conviction); *see also id.* at 186 n.20, 188-89. Indeed, in Part IV of his opinion he agreed that the case should be remanded to the California Supreme Court to determine if certain hearsay evidence introduced against the accused was

"too unreliable to have been admitted . . . ." *Id.* at 189. The hearsay to which Justice Harlan referred was an out-of-court statement for which the declarant claimed a memory loss. In so concluding, Justice Harland relied in part upon *Stovall* v. *Denno*, 388 U.S. 293 (1967), a due process case involving a potentially unreliable out-of-court identification. 399 U.S. at 188-89.

The majority in *Green* arrived at the same conclusion with respect to this evidence; however, it based its conclusion on the Confrontation Clause. 399 U.S. at 168-70. Hence, the memory loss by the witness in *Green* prompted both the majority and Justice Harlan to remand for a determination on the question of reliability. The theories for doing so happened to be premised on different clauses in the Constitution.[25]

Thus, taking Justice Harlan's *Green* opinion as a whole one arrives at a very different position than the one now staked out by the government. Although Justice Harlan endorsed a specific and narrow reading of the Confrontation Clause, he fully

---

[25] In a concurring opinion in *Dutton* v. *Evans*, 400 U.S. 74, 93-100 (1970), Justice Harlan did modify his view of the Confrontation Clause. First, contrary to the position he had taken in *Green*, he accepted the view that cross-examination was a primary concern of the Confrontation Clause. According to Justice Harlan,

> If one were to translate the Confrontation Clause into language in more common use today, it would read: "In all criminal prosecutions, the accused shall enjoy the right to be present and to cross-examine the witnesses against him."

400 U.S. at 95. In addition, Justice Harlan rejected as unsound, historically and as a policy matter, his conclusion in *Green* that the Confrontation Clause imposed an availability requirement on the government. *Id.* at 95-96. In general, however, Justice Harlan continued to adhere to the view that the Confrontation Clause was not the appropriate vehicle for assessing the admissibility of hearsay. That vehicle was to be found in the Due Process Clauses of the Fifth and Fourteenth Amendments. 400 U.S. at 97-100. The question was whether hearsay evidence admitted against the accused was trustworthy, both generically and under the facts and circumstances of the particular case. *Id.* at 99.

recognized that the introduction of hearsay evidence could pose substantial threats to the adversarial system of criminal justice. However, the Confrontation Clause was not, according to Justice Harlan, the repository of the necessary protections against such threats. Among other things it was historically and logically ill-suited to the task. The Due Process Clause, on the other hand, provided the appropriate vehicle for such review. Hence regardless of whether one continues to apply the theories of the Confrontation Clause developed by the majority in *Green* and futher refined in *Roberts* or whether one seeks guidance from Justice Harlan's concurring opinion in *Green*, the basic approach is the same. Before an out-of-court statement can be introduced against an accused as substantive evidence of guilt, it must bear certain indicia of reliability.[26]

The Court of Appeals in this case quite naturally relied upon the views expressed by this Court in *Roberts*. Indeed, the government did not suggest in its arguments below that the approach of Justice Harlan be considered. However, in terms of practicalities the choice between these models is nil. Under either one must determine the extent to which a memory loss has undermined the adversarial process. Regardless of the theory one espouses, at issue is a defendant's right to be convicted only upon evidence that could be fairly evaluated by the trier of fact for its reliability and trustworthiness.

B. Reliance On *Delaware* v. *Fensterer* and *Pennsylvania* v. *Ritchie:* Exposing The Illogic Of The Government's Theory

Instead of relying upon *Ohio* v. *Roberts*, *supra*, the case most closely on point to the issues now presented, the government relies on language found in two cases having nothing to do with the admissibility of out-of-court statements. *Delaware* v. *Fensterer*, 106 S.Ct. 292 (1985) (per curiam); *Pennsylvania* v.

---

[26] Of course, in *Roberts* the Court noted that, "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." 448 U.S. at 66. Out-of-court identifications have not been held to be among the firmly rooted exceptions. *See id.* at 66 n.8. The government has not argued otherwise.

Ritchie, 107 S.Ct. 989 (1987) (plurality). The government's interpretation of those decisions is inconsistent with this Court's decision in *Roberts* and reads more into *Fensterer* and *Ritchie* than those cases can possibly support.[27]

---

[27] The government similarly overestimates the support that can be found for its position from other sources. In footnote 15 of its brief, page 29-30, the government indicates that its position appears to be supported by *California* v. *Green*, 399 U.S. at 164, where this Court stated, "the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements. . . ." The government's editing of this sentence ignores a significant portion of the very sentence quoted. That sentence, which deals with the confrontation clause issues with respect to prior inconsistent statements actually reads as follows: ". . . the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements *and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross examination at trial as to both stories.*" 399 U.S. at 164 (emphasis added). For purposes of the present case, this sentence does no more than restate the issue in dispute, which is whether the defendant in this case was provided with an opportunity to fully cross-examine at trial. As the court stated earlier in *Green*. "The [Confrontation] Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross examination." *Id.* at 158.

Similarly, in the same footnote in its brief, the government cites Professor Morgan's 1948 article, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 179 (1948), as the one scholarly work supporting its proposition that when an in-court witness affirms having made an out-of-court statement the dangers normally inherent in hearsay do not exist. However, as with its comments from *California* v. *Green*, the government has chosen to leave out several essential features of this argument. In particular the government leaves out Professor Morgan's explanation of this conclusion and the underlying rationale justifying it. That underlying rationale was as follows: "The declarant as a witness is now under oath and now purports to remember and narrate accurately. The

Delaware v. *Fensterer, supra*, is a per curiam opinion issued without the benefit of briefing by the parties. 106 S.Ct. at 296 (Marshall, J., dissenting). As a consequence, its reach should be carefully limited to the particular facts and legal issues there presented. Indeed, the Court's opinion in *Fensterer* seems designed to do precisely that. The government, on the other hand, seeks to excise *Fensterer* from its specific context and to apply it in circumstances for which it was expressly not designed.

At issue in *Fensterer* was the admissibility of live testimony elicited from an expert who could not recall which of three scientific theories he relied upon in reaching his expert opinion. Defendant claimed a denial of confrontation based on the expert's memory lapse. Prior to assessing this claim, the Court observed, "This Court's Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination." *Id.* at 294. According to the *Fensterer* Court the case before it fell into neither category. *Id.* The state did not attempt to introduce any out-of-court statement by the expert; nor did the trial court or the law limit the scope of cross-examination. As a consequence, Confrontation Clause cases arising in those contexts had no bearing upon the resolution of the issue pre-

---

adversary can now expose every element that may carry a danger of misleading the trier of fact both in the previous statement and in the present testimony, and the trier of fact can judge whether both the previous declaration and the present testimony are reliable in whole or in part." 62 Harv. L. Rev. at 192. Thus, Professor Morgan's conclusion appears to rest upon the rationale that the witness will provide an in-court version of the event which is subject to cross examination thus, "exposing every element that may carry a danger of misleading the trier of fact." It is the defense position in the present case that the lack of any recollection as to the facts underlying the witness' prior statement reduces to an unconstitutional degree the defendant's ability to effectively cross examine in such a manner.

sented.[28] *Id.* at 295. By a parity of reasoning, *Fensterer* provides little or no guidance for cases that do arise in that context.[29]

After briefly examining the facts of the case before it, the Court held that the Confrontation Clause was not violated. Those facts established that the memory lapse was exposed to the trier of fact under circumstances that permitted the trier of fact to evaluate the credibility of the expert both through cross-examination and through the testimony of a defense expert. Despite its specific ruling, the Court left open "whether there are circumstances in which a witness' lapse of memory may so frustrate any opportunity for cross-examination that admis-

---

[28] The *Fensterer* Court made it quite clear that had the issues before arisen in the context of the admissibility of an out-of-court statement, *Ohio* v. *Roberts*, 448 U.S. 56 (1980), *Dutton* v. *Evans*, 400 U.S. 74 (1970), and *California* v. *Green*, 399 U.S. 149 (1970), would have provided the proper guidance. The present case does involve the admissibility of an out-of-court statement. The government here, however, relies upon none of these cases. 106 S.Ct. at 294.

[29] In a concurring opinion in *Fensterer*, Justice Stevens suggests that the distinction, drawn by the majority, between an out-of-court statement and the in-court testimony of the expert witness was not entirely convincing. *Delaware* v. *Fensterer*, 106 S.Ct. 292, 296-97 (1985). If Justice Stevens is correct, this means only that a reliability analysis may be appropriate in the context of in-court testimony just as it is required with respect to out-of-court statements. In any particular case, the distinction is not between hearsay and non-hearsay, but between testimony that can be assessed for its reliability and testimony that cannot. Typically, however, as a comparison between this Court's decisions in *Fensterer* and *Ohio* v. *Roberts* indicates, hearsay is more likely to present reliability testing problems. In any event, the question is not whether hearsay testimony may generally pose greater problems of unreliability than in-court testimony, but whether the specific testimonial evidence challenged is susceptible to being evaluated for reliability and trustworthiness. In *Fensterer* it was. As explained in the text, that same conclusion does not follow with respect to the out-of-court identification at issue in this case.

sion of the witness' direct testimony violates the Confrontation Clause." *Id.* at 295. It was clear, however, that on the facts and circumstances of *Fensterer* the jury was afforded an ample opportunity to evaluate the truth and accuracy of the contested expert opinion. *Id.* As the *Fensterer* Court correctly observed, the Confrontation Clause provides no more. *Id.*

As was discussed earlier, this Court has held that the purpose of cross-examination is to provide a basis upon which to evaluate the truth and accuracy of testimonial evidence introduced against a defendant in a criminal trial. *Ohio* v. *Roberts*, 448 U.S. at 63-64; *California* v. *Green*, 399 U.S. at 158. In *Fensterer*, that purpose was clearly satisfied. As the *Fensterer* Court pointed out, in the context of expert testimony, the confession of a memory loss with respect to the basis for the proffered testimony "invites the jury to find that his opinion is as unreliable as his memory." 106 S.Ct. at 294. Hence, under *Fensterer*, the Confrontation Clause is not automatically implicated whenever a witness admits to a lack of memory with respect to an assertion of fact made by that witness on direct testimony. In the typical case "simple questioning" of such a witness "will satisfy the purposes of cross-examination." *Pennsylvania* v. *Ritchie*, 107 S.Ct. 989, 1004 (1987) (Blackmun, J., concurring). In other words, cross-examination of such a witness will usually accomplish exactly what cross-examination was meant to do, namely, provide the trier of fact with a basis upon which to evaluate the reliability of the equivocal testimony.[30] On the other hand, a hearsay declarant who legit-

---

[30] Consistent with this view, Justice Blackmun described the *Fensterer* decision as follows:

> [In *Delaware* v. *Fensterer*] the Court rejected a Confrontation Clause challenge brought on the ground that an expert witness for the prosecution could not remember the method by which he had determined that some hair of the victim, whom Fensterer was accused of killing, had been forcibly removed. . . . [I]t is easy to see why cross-examination was effective there. The expert's credibility and conclusions were seriously undermined by a demonstration that he had forgotten the method he used in his analysis. Simple questioning provided such a demonstration, and was reinforced by the testimony of the defendant's own expert who could undermine the other expert's opinion.

Pennsylvania v. *Ritchie*, 107 S.Ct. 989, 1004-05 (1987) (Blackmun, J., concurring). Justice Blackmun's remarks were made in explanation of his view that the Confrontation Clause was not automatically satisfied by pacing a witness through the mechanics of cross-examination. At least in some cases, courts must inquire into the effectiveness of cross-examination. *Id.* at 1005 & n.1. According to Justice Blackmun, to hold otherwise would make the Confrontation Clause an "empty formality." *Id.* at 1004.

imately cannot recall the basis for an out-of-court identification will not necessarily be impeached by the lapse in memory. This is especially true if there is a rational explanation for the lapse. Unlike the situation with an expert witness, the lapse has no bearing on the reliability of the contested testimony. An expert who cannot remember the methods of his scientific research is self-impeaching; an individual who cannot recall the basis for an out-of-court identification cannot be so characterized. Any one of a number of factors can contribute to that lack of recollection, none of which undermine the legitimacy of the identification. The only question is whether at the time it was made the identification was reliable. *Manson* v. *Brathwaite*, *supra*, 432 U.S. at 114. When an eyewitness cannot recall the reason for an out-of-court identification, the trier of fact is given no basis upon which to evaluate the reliability. It is, of course, the creation of such a basis that is at the heart of the Confrontation Clause.

In *Pennsylvania* v. *Ritchie*, 107 S.Ct. 989 (1987), this Court rejected a claim to a right of discovery that was premised on the Confrontation Clause. Like the situation presented in *Fensterer*, the facts of *Ritchie* did not fit neatly into earlier categories of Confrontation Clause decisions. By analogy the defendant in *Ritchie* relied upon cases involving restrictions imposed upon the scope of cross-examination at trial. A plurality of this Court rejected that analogy, finding that line of cases inapt. As stated in the plurality opinion, "If we were to accept this broad interpretation of *Davis* [v. *Alaska*, 415 U.S. 308 (1974)], the effect would be to transform the Confrontation

Clause into a constitutionally-compelled rule of pretrial discovery." 107 S.Ct. at 999. According to the plurality, the right of confrontation was a trial right, not a discovery right.

The government relies upon the plurality opinion in *Ritchie* for the broad proposition that the Confrontation Clause can only be violated by impediments to cross-examination for which the government or the trial court is responsible. Brief for the United States at 25. Of course, the opinion in *Ritchie* was addressing a much narrower issue, namely, whether cases arising in the context of court imposed limitations on cross-examination could support a right to pre-trial discovery. The *Ritchie* plurality limited the scope of such cases to trial rights. Certainly, *Ritchie* did not purport to overrule *Ohio* v. *Roberts*, *Dutton* v. *Evans*, and *California* v. *Green*, all of which relate to the introduction of out-of-court statements and none of which have anything to do with government or court imposed restrictions on cross-examination. Yet the government's reading of *Ritchie* would clearly eviscerate those decisions. Indeed, the basic error of the government's reasoning is that it fails to note the specific context of the *Ritchie* opinion and to recognize the distinction between cases arising in that context and those such as *Roberts* that are more pertinent to the present proceeding.

Curiously, the government's interpretation of *Ritchie* goes beyond even the government's stated theory of the Confrontation Clause. According to the government the physical presence of a declarant satisfies the Confrontation Clause unless the declarant is not "physically and mentally capable of understanding the proceedings and engaging in a question and answer dialogue . . . ." Brief for the United States at 18. The government takes a similar position with respect to a declarant who refuses to testify. *Id.* How the government squares those exceptions to its physical presence model with its reading of *Ritchie* is unclear. Certainly, the government is not responsible for a witness who is mentally incapable of understanding the proceedings. Nor, in the absence of some government interference, is the government responsible for a witness who refuses to testify.

The logic of the government's position is illusive. Surely, in terms of government responsibility, there is no distinction between a witness incapable of understanding the proceedings and a witness who suffers a memory lapse. In neither instance has the government created an impediment to cross-examination. It appears that the distinction drawn by the government is based upon an assumption that certain types of witnesses are not cross-examinable. Brief for the United States at 18. If that is case, the government necessarily concedes the existence of a point at which an out-of-court statement cannot be effectively tested through cross-examination. Hence, the physical presence model is an illusion. The question is not whether the declarant is present, but whether, through cross-examination, the out-of-court statement made by the declarant can be evaluated for its reliability and trustworthiness. In this regard, the witness who is not capable of understanding questions posed is on the same footing as the witness who legitimately cannot recall the basis for an earlier out-of-court statement. Both stand as an impediment to the constitutionally necessary reliability evaluation.

6. Application Of The Law To The Facts Of This Case.

The District Court permitted the prosecution to introduce into evidence two out-of-court identifications made by Foster. J.A. at 31, 69-72, 75-76. On the witness stand, Foster recalled having made one of those statements. *Id.* at 28, 31. He could not recall, however, whether that statement was based upon something he had perceived at the time of the assault or whether it was based upon something other than his own personal knowledge. *Id.* at 45. The only thing Foster could recall about the assault was feeling an impact on his head and seeing drops of blood on the floor. *Id.* at 26-27, 35.

Admittedly, Foster did take the witness stand and he did answer questions posed by defense counsel. However, with respect to the basis upon which he identified the defendant, Foster had no recollection. He did not know whether he had ever observed his assailant or whether he even had an oppor-

tunity to do so. He did not know what, if any, information was conveyed to him while he was recuperating in the hospital prior to the time he identified defendant as his assailant. *Id.* at 42. Finally, Foster's inability to state whether he had seen assailant at the time of the assault was rationalized by the prosecution's medical expert as the result of a gradual and selective memory loss caused by the assault. *Id.* at 49; 2 Tr. at 161-70.

Under Federal Rule of Evidence 801(d)(1)(C), due to his lack of memory Foster was unavailable to be cross-examined concerning his out-of-court statement. Although he could remember having made one of the identifications, he could not recall the basis for having done so. If the purpose of Rule 801(d)(1)(C) is to ensure that out-of-court identifications are adequately probed for their reliability, it is not possible to isolate the actual identification from the basis upon which that identification was made. The reliability of the statement is a direct product of the declarant's opportunity to observe the criminal at the time the crime was committed. The rule and the policy underlying it would be ill-served by any narrower construction.

Moreover, Professors Louisell and Mueller, upon whom the government relies for its narrow construction of the rule, recognize that evidence admitted under Rule 801(d)(1)(C) must be carefully scrutinized to ensure that the out-of-court identification is based upon the personal knowledge of the declarant. Hence, under even their interpretation of the rule, the identification here would have been inadmissible.

Introduction of the evidence also violates the Confrontation Clause.[31] Resolution of this point does not turn on whether Foster was available for cross-examination. Rather the question is, given Foster's memory lapse, whether cross-examination could provide the trier of fact with an adequate basis upon which to evaluate the reliability of the out-of-court identifications. Since the only way one could assess the reliability of the

[31] Of course, this issue need not be reached if this case can be fully resolved under Federal Rule of Evidence 801(d)(1)(C).

identification is through some factual exploration of both Foster's opportunity to observe the assailant at the time of the assault and those factors that may have influenced him prior to the identification, Foster's memory lapse is a complete bar to the evaluation of reliability. In short, there was no opportunity to engage in effective cross-examination, effective being that cross-examination that could provide some basis for evaluating reliability.

Even in the absence of an opportunity to cross-examine, admission of an out-of-court statement will not violate the Confrontation Clause if that statement bears adequate "indicia of reliability." There are no such indicia of reliability in this case. Indeed, given the facts of this case everything points in the opposite direction. Perhaps most importantly, there is no evidence that Foster had an opportunity to observe his assailant. At a minimum in order to pass some threshold level of reliability, there must be some indication that an out-of-court identification derives from an adequate opportunity to observe the criminal at the time the crime is committed. It is at this point that the relationship between the Confrontation Clause and the Due Process Clause becomes critical. Considering the lack of evidence on the question of opportunity to observe and, indeed, of personal knowledge, under either Clause this identification was dangerously unreliable and inadmissible.[32]

[32] The Court of Appeals thoroughly assessed these reliability concerns. *See infra* pp. 6-8.

CONCLUSION

The most appropriate resolution of the case is under Federal Rule of Evidence 801(d)(1)(C). In accordance with that rule this Court should hold that admission of Foster's out-of-court identifications was error and that given the inordinate weight the average juror gives an eyewitness identification the error was not harmless. In the alternative, this Court should hold that admission of these identifications violated the Confrontation Clause.

Respectfully submitted,

ALLAN IDES
(Appointed by this Court)
STANLEY A. GOLDMAN
Loyola Law School
1441 West Olympic Boulevard
Los Angeles, California 90015
(213) 736-1054
Counsel for Respondent

REPLY BRIEF

No. 86-877

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES JOSEPH OWENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-877

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES JOSEPH OWENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In our opening brief, we contended that the court of appeals erred in holding that respondent's rights under the Confrontation Clause and Fed. R. Evid. 801(d)(1)(C) were violated because of the partial memory loss of assault victim John Foster. First, relying on Justice Harlan's concurring opinion in *California* v. *Green*, 399 U.S. 149, 188 (1970), we explained that Foster's presence at trial satisfied the Confrontation Clause, notwithstanding his partial memory loss (U.S. Br. 16-35). Second, we indicated (U.S. Br. 35-39) that even if a defendant were guaranteed not only the right to confront and cross-examine the government's witnesses but also the right to engage in some level of meaningful or "effective" cross-examination, that requirement was satisfied here. Third, we explained (U.S. Br. 40-44) that the requirements of Fed. R. Evid. 801(d)(1)(C) were satisfied in this case because Foster was present in court and subject to cross-examination about his out-of-court statement.

1. Respondent contends (Resp. Br. 10-15, 19-20 & n.12, 34, 38, 46-47) that under the principles of *Ohio* v.

Roberts, 448 U.S. 56 (1980), the admission of Foster's pretrial identification violated the Confrontation Clause. According to respondent, Foster's identification was inadmissible under *Roberts* because his memory loss rendered cross-examination ineffective and because his identification did not bear adequate "indicia of reliability."

At issue in *Roberts* was whether the Sixth Amendment was violated by the admission of preliminary hearing testimony of a witness who was not produced at trial (448 U.S. at 58). The Court summarized the controlling legal principles by stating (*id.* at 66 (emphasis added)) that "*when a hearsay declarant is not present for cross-examination at trial,* the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' "[1]

Roberts provides no support for respondent's position. First, the inquiry into "indicia of reliability" was triggered in that case only because the witness was not present in court and subject to cross-examination. The Court did not suggest that when a witness is cross-examined at trial but suffers a partial memory loss, a reliability inquiry must be undertaken. Second, *Roberts* makes clear that even when an out-of-court statement by an unavailable declarant is

[1] In explaining the reliability requirement, the Court stated (448 U.S. at 66 (footnote omitted)) that the reliability of an out-of-court statement by an unavailable declarant "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Even where there is no such exception, the Court held that evidence may still be admitted if it is supported by "a showing of particularized guarantees of trustworthiness" (*ibid.*). In a recent case involving co-conspirator declarations offered under Fed. R. Evid. 801(d)(2)(E), the Court held that because the co-conspirator exception to the hearsay rule is firmly rooted, no independent inquiry into reliability is required under the Sixth Amendment, even when the declarant is unavailable. *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), slip op. 9-11.

involved, there is no need to inquire into its inherent reliability or unreliability if the statement was subject to cross-examination at the time it was made (448 U.S. at 72-73). It follows, *a fortiori,* that an inquiry into a statement's inherent reliability is not required when the maker of the statement is present at trial and is subject to cross-examination about the statement at that time. See Pet. App. 29a (Boochever, J., dissenting) (cross-examination of Foster at trial enabled the jury "to make its determination of the weight to accord his testimony").

Respondent asserts that in *Roberts* this Court rejected the approach to the Sixth Amendment significance of memory loss taken by Justice Harlan in *Green* and urged by the government here (Resp. Br. 35-36 (quoting 448 U.S. at 68 n.9)).[2] As we have explained (U.S. Br. 21-22 n.10), however, the Court in *Roberts* was simply indicating that it had not adopted Justice Harlan's general thesis that the "Confrontation Clause requires only that [the] prosecution produce available witnesses" (448 U.S. at 67 n.9). The Court was not addressing the Sixth Amendment significance of a witness's memory loss, and it is unlikely that the Court would have resolved that issue—which was carefully left open by the majority in *Green* (399 U.S. at 168-169)—in such an offhand manner. Indeed, other statements in *Roberts* are entirely consistent with Justice Harlan's position. Thus, the Court declined to consider whether the questioning of the witness at the preliminary hearing "surmount[ed] some inevitably nebulous threshold of 'effectiveness' " (448 U.S. at 73 n.12). It held (*ibid.*) that

[2] Respondent incorrectly asserts (Resp. Br. 38) that the government did not rely below on Justice Harlan's analysis in *Green*. As the court of appeals noted (Pet. App. 17a-18a), the government's position was based on the Third Circuit's opinion in *United States ex rel. Thomas* v. *Cuyler*, 548 F.2d 460 (1977), in which the court adopted Justice Harlan's approach.

"in all but * * * extraordinary cases," such as where a question of ineffective assistance of counsel is involved, "no inquiry into 'effectiveness' is required." See also *Pennsylvania* v. *Ritchie*, No. 85-1347 (Feb. 24, 1987) (plurality opinion), slip op. 11-12.

Notwithstanding the language in *Roberts* rejecting a case-by-case inquiry into the effectiveness of cross-examination, respondent urges precisely that position in this case (see Resp. Br. 45-47). He states that the Sixth Amendment question "does not turn on whether Foster was available for cross-examination" (Resp. Br. 46). According to respondent, the Confrontation Clause was violated here because "there was no opportunity to engage in effective cross-examination, effective being that cross-examination that could provide some basis for evaluating reliability" (Resp. Br. 47).[3]

[3] Respondent cites the California Supreme Court's decision on remand from this Court in *Green* (*People* v. *Green*, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494, cert. dismissed, 404 U.S. 801 (1971)) apparently as an example of the proper application of a case-by-case inquiry into the effectiveness of cross-examination (Resp. Br. 19). That case, however, only undercuts his position. The California Supreme Court first identified the purposes of the Confrontation Clause: "(1) to insure reliability by means of the oath, (2) to expose the witness to the probe of cross-examination, and (3) to permit the trier of fact to weigh his demeanor" (3 Cal. 3d at 989, 479 P.2d at 1003, 92 Cal. Rptr. at 499). The court then went on to uphold the admission of the witness's out-of-court statement to a police officer on the ground that those three purposes were satisfied. The court did not undertake any inquiry into the inherent reliability of the statement, and it did not require that the cross-examination meet any particular threshold level of effectiveness. Indeed, the court noted that the defense lawyer had barely engaged in any cross-examination on the relevant points, but it nonetheless held that the *opportunity* for cross-examination was sufficient because the witness "was on the stand and under oath, and had just admitted making the statement" (3 Cal. 3d at 990, 479 P.2d at 1003-1004, 92 Cal. Rptr. at 499-500). In the present case, the three purposes of the Clause identified by the California Supreme Court were plainly satisfied: Foster testified under oath; he was exposed to cross-examination; and the jury was able to observe his demeanor. Moreover, like the witness in *Green*, Foster recalled making the out-of-court statement to the agent.

Besides being inconsistent with the language in *Roberts*, respondent's approach offers no standard for evaluating the "effectiveness" of cross-examination in particular cases. For example, it is unclear how respondent's approach would apply if Foster had testified that he thought he had seen his assailant's face but could not recall any of the details.[4] Moreover, implicit in respondent's argument is the premise that a defendant is constitutionally guaranteed that the government's witnesses will have clear and sharp memories of the events in question. Yet, this Court has indicated that the Confrontation Clause pro-

[4] Respondent's only suggestion of a standard for assessing the effectiveness of cross-examination is in his observation that Foster's memory loss went to the identity of his assailant (Resp. Br. 4, 46-47). By that observation, respondent may mean to suggest that memory loss poses a problem only when it relates to a central issue in the case. But focusing on the significance of the fact to which the memory loss relates would make no logical sense. In many cases, a witness's credibility will be undermined – and thus cross-examination rendered especially "effective" – precisely because the forgotten fact is critical. For example, in *Delaware* v. *Fensterer*, 474 U.S. 15 (1985) (per curiam), the subject of the expert's memory loss was the method he used to conduct a scientific test, which could not have been more crucial to his testimony. It was precisely because that fact was so fundamental that the defendant's Sixth Amendment argument was so weak. As the Court noted (*id.* at 19), "[q]uite obviously, an expert witness who cannot recall the basis for his opinion invites the jury to find that his opinion is as unreliable as his memory." Similarly, the courts of appeals have repeatedly rejected Sixth Amendment challenges in cases involving memory loss even where such memory loss went directly to whether the defendant committed the crime at issue. See, *e.g.*, *United States* v. *Baker*, 722 F.2d 343, 347-349 (7th Cir. 1983), cert. denied, 465 U.S. 1037 (1984); *United States* v. *Russell*, 712 F.2d 1256, 1258 (8th Cir. 1983); *United States* v. *Payne*, 492 F.2d 449 (4th Cir.), cert. denied, 419 U.S. 876 (1974).

vides no such guarantee. See *Delaware* v. *Fensterer*, 474 U.S. 15, 21-22 (1985) (per curiam).[5]

In challenging the government's endorsement of Justice Harlan's approach in *Green*, respondent criticizes the government (Resp. Br. 45) for acknowledging three exceptions to the general proposition that a witness's physical presence at trial satisfies the Confrontation Clause: cases in which the court restricts cross-examination; cases in which the witness refuses to be cross-examined; and cases in which the witness is incapable of understanding the proceedings or engaging in a question-and-answer dialogue (see U.S. Br. 18). Those exceptions are entirely consistent with the decisions of this Court. See, *e.g.*, *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986) (trial court restriction on cross-examination); *Davis* v. *Alaska*, 415 U.S. 308 (1974) (same); *Douglas* v. *Alabama*, 380 U.S. 415 (1965) (refusal of witness to testify); see also *United States ex rel. Thomas* v. *Cuyler*, 548 F.2d 460, 463 (3d. Cir. 1977) (distinguishing witness who refuses to be sworn or testify from one who simply suffers a loss of memory); *United States* v. *Infelice*, 506 F.2d 1358, 1363 (7th Cir. 1974) (loss of memory is "not comparable to a refusal to answer questions"), cert. denied, 419 U.S. 1107 (1975). Moreover, they are respon-

[5] The *Fensterer* Court stated that "[t]he Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion" (474 U.S. at 21-22). Rather, it noted (*id.* at 22) that the Clause "is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." Although *Fensterer* did not involve an out-of-court statement, the case cannot be distinguished on that ground, as we explained in our opening brief (at 27-30). Indeed, respondent himself seems to recognize (Resp. Br. 41 n.29) that any such distinctioa would be analytically unsound.

sive to the principles underlying the Confrontation Clause. If a witness refuses or is unable to participate in cross-examination, or if the court unreasonably restricts that cross-examination, it is fair to say that the defendant has not had an opportunity to confront the witness. On the other hand, where the witness has participated in cross-examination and has responded to questions, the defendant has not been denied his right of confrontation. At most, the defendant has confronted a witness who is shown by the cross-examination to have an imperfect recollection about the events he witnessed and the prior statements he made. To be sure, there may be cases in which courts will be faced with difficult decisions as to whether a witness is so lacking in mental or physical capacity as to be incapable of participating in cross-examination. But that decision is surely a narrower one—and one more responsive to the point of the Confrontation Clause—than the inquiry that respondent suggests into whether cross-examination was "effective" in a particular case.

Even if respondent is correct that the Confrontation Clause guarantees him a right to "effective" or meaningful cross-examination, we submit that he achieved effective cross-examination in this case (see U.S. Br. 35-39). In claiming that he was unable to conduct meaningful cross-examination, respondent disregards the extensive and fruitful cross-examination of Foster at trial and the use that his attorney was able to make of that cross-examination during summation (see *ibid.*). For instance, by questioning Foster, respondent was able to demonstrate that Foster had no present memory of seeing his assailant and could not recall having given several prior statements that were inconsistent with his identification of respondent as the assailant (see U.S. Br. 37-38 & n.19). Thus, the vehicle of cross-examination exposed Foster's memory loss and the problems surrounding his identifica-

tion, "thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony" (*Fensterer*, 474 U.S. at 22).

Moreover, while Foster did not recall whether he had seen his assailant, he nonetheless had a detailed memory about events contemporaneous with the assault. In addition, he had a vivid recollection of the visit from Mansfield during which he identified respondent and selected respondent's picture from a photo array. See U.S. Br. 36-37. Respondent was able to probe these areas, all of which went to Foster's credibility and to his ability to observe and recall the events in question. In short, as the dissenting judge below noted (Pet. App. 29a), the questioning of Foster "directly addressed" the various "dangers surrounding out-of-court identification—misperception and failure of memory," and thus provided an adequate basis for the jury to determine what weight to accord to Foster's testimony.

2. In addition to claiming a denial of his right of confrontation, respondent maintains (Resp. Br. 10-12, 21-25) that Foster's memory loss resulted in a denial of due process. Respondent relies primarily (Resp. Br. 21) on cases involving claims that out-of-court identification procedures were unduly suggestive. *E.g.*, *Manson* v. *Brathwaite*, 432 U.S. 98 (1977); *Neil* v. *Biggers*, 409 U.S. 188 (1972); *Foster* v. *California*, 394 U.S. 440 (1969); *Stovall* v. *Denno*, 388 U.S. 293 (1967). See also *Simmons* v. *United States*, 390 U.S. 377 (1968).

Those cases all involved out-of-court identifications in which the procedures used by the government may have suggested the identity of the offender. As those cases suggest, it is only when there has been a prior suggestive identification that it is necessary for a court to address the question whether the identification was nonetheless sufficiently reliable to satisfy due process concerns. See *Biggers*, 409 U.S. at 199 (noting that the issue was "whether

under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive"); *United States* v. *Givens*, 767 F.2d 574, 581 (9th Cir.), cert. denied, 474 U.S. 953 (1985); *United States* v. *Briggs*, 700 F.2d 408, 412 (7th Cir.), cert. denied, 461 U.S. 947 (1983); *Brayboy* v. *Scully*, 695 F.2d 62, 65 (2d Cir. 1982), cert. denied, 460 U.S. 1055 (1983); *United States* v. *Gantt*, 617 F.2d 831, 840 (D.C. Cir. 1980); *Fillippini* v. *Ristaino*, 585 F.2d 1163, 1168 (1st Cir. 1978); *Williams* v. *McKenzie*, 576 F.2d 566, 571 (4th Cir. 1978).[6]

Nothing in the record in this case suggests that Foster's identification of respondent from the photo array was the product of suggestive police procedures. According to Agent Mansfield, who conducted the out-of-court identification, Foster was alert and coherent, and he named respondent as his assailant even before being shown any photographs (J.A. 75-76). The photo spread shown to Foster contained eight black males, all of whom were inmates at the prison where Foster worked (J.A. 76-77). When Foster was shown the photo array, he identified respondent as his assailant (J.A. 32, 77), and there is no evidence that Mansfield in any way prompted or encouraged that identification. Moreover, in contrast to the cases upon which respondent relies, Foster was not identifying a stranger; rather, he was selecting a prisoner with whom he had had daily contact in his capacity as a prison counselor (J.A. 19, 35).

Respondent also maintains (Resp. Br. 36-37) that he should prevail under the due process analysis outlined by Justice Harlan in *Green*. According to respondent (Resp.

---

[6] The statement in *Manson* (432 U.S. at 114) that "reliability is the linchpin in determining the admissibility of identification testimony" is not to the contrary. The *Manson* Court focused on the reliability of the identification because the State had conceded that the identification was unnecessarily suggestive (*id.* at 109).

Br. 36), Justice Harlan "endorsed a due process model virtually identical to the 'indicia of reliability' approach adopted in *Roberts* under the rubric of the Confrontation Clause."

While respondent is correct that Justice Harlan recognized the availability of a due process challenge in cases where there is no confrontation violation (see 399 U.S. at 186-187 n.20, 189 (Harlan, J., concurring)), he errs in suggesting that Justice Harlan was proposing a new model of due process or one that is comparable to the reliability inquiry discussed in *Roberts*. In fact, Justice Harlan was simply making it clear that under the Court's precedents, a defendant who receives a trial that is fundamentally unfair can raise a due process claim.[7] The majority in *Green* likewise acknowledged a narrow due process argument that "might prevent convictions where a reliable evidentiary basis is totally lacking" (399 U.S. at 164 n.15).

Foster's testimony plainly did not violate these standards. To begin with, Foster's identification was certainly not devoid of reliability. There was significant evidence suggesting that Foster had been in a face-to-face encounter with his assailant, such as the location of his injuries (see

[7] According to Justice Harlan (399 U.S. at 186 n.20 (citations omitted) (Harlan, J., concurring)), "[d]ue process does not permit a conviction based on no evidence, or on evidence so unreliable and untrustworthy that it may be said that the accused has been tried by a kangaroo court." Similarly, Justice Harlan "would not permit a conviction to stand where the critical issues at trial were supported only by *ex parte* testimony not subjected to cross-examination, and not found to be reliable by the trial judge" (*ibid.*). He noted that it would be an "unusual situation where the prosecution's entire case is built upon hearsay testimony of an unavailable witness" and that "[i]n such circumstance the defendant would be entitled to a hearing on the reliability of the testimony" (*ibid.*). He further noted that due process "requires that the defense be given ample opportunity to alert the jury to the pitfalls of accepting hearsay at face value, and the defendant would, of course, upon request be entitled to cautionary instructions" (*id.* at 186-187 n.20).

Pet. App. 6a)[8] and Foster's own recollection—supported by medical evidence—that he injured his finger by jamming it into his assailant's chest (J.A. 29, 34, 51). In addition, despite respondent's contention at trial that his name was probably suggested to Foster by a hospital visitor (J.A. 83-84), there was no evidence to that effect. Foster himself, while not ruling out the possibility, expressed doubt that his identification was based on anything other than personal knowledge (J.A. 46-47). Moreover, Foster was not identifying a stranger but was implicating someone he knew well and would have immediately recognized (J.A. 35). And at the time he identified respondent to Mansfield, Foster was alert and coherent, and he made his identification without hesitation (J.A. 75-77). It is also significant that the trial judge gave a detailed instruction to guide the jury in its evaluation of identification testimony (see 7 Tr. 181-183).[9] And respondent was given an unrestricted opportunity to cross-examine Foster and to drive home to the jury all the reasons that his testimony should not be given any weight. Finally, Foster's identification was corroborated by other extensive physical and testimonial evidence (see U.S. Br. 2-7),

[8] The court of appeals acknowledged (Pet. App. 6a) that "the location of [Foster's] injuries provides support for the theory that [he] saw his attacker." It then speculated, however (*ibid.*), that the assailant may have been wearing a mask or Foster may have been looking down or away at the time of the attack.

[9] The court instructed the jury that in evaluating identification testimony, it should consider (1) whether it is "convinced that the witness had the capacity and an adequate opportunity to observe the offender," (2) whether the identification "was the product of [the witness's] own recollection," (3) whether the witness, on other occasions, "failed to make an identification of the defendant, or made an identification that was inconsistent with his identification at trial," and (4) whether the witness was credible, using the same criteria that govern the evaluation of the credibility of any other witness.

evidence that the court of appeals itself viewed as sufficient to render any non-constitutional error harmless (Pet. App. 12a). Under these circumstances, the admission of the evidence of Foster's identification did not violate respondent's right to due process.

3. Respondent maintains (Resp. Br. 25-33) that under Fed. R. Evid. 801(d)(1)(C), evidence of an out-of-court identification is inadmissible unless the witness who made the identification recalls the circumstances under which the identification was made. That contention is erroneous.

As we explained (U.S. Br. 41-42), nothing in the Rule suggests that the witness must be subject to cross-examination concerning the underlying events, let alone that he must remember those events. The Rule requires only that the witness testify at the trial or hearing and be "subject to cross-examination concerning the statement * * *." As we noted (*ibid.*), the language in the Rule is particularly instructive when compared to Fed. R. Evid. 804(a), which defines unavailability for certain purposes to include situations in which the witness "testifies to a lack of memory of the subject matter of [his] statement." If Congress had intended to impose a similar requirement under Rule 801(d)(1)(C), it plainly knew how to say so.[10]

[10] Respondent contends (Resp. Br. 32) that Rule 804(a) supports his interpretation of Rule 801(d)(1)(C). He finds it illogical that someone could be considered "unavailable" under Rule 804(a), yet "subject to cross-examination" under Rule 801(d)(1). But that is precisely how the rules in question are drafted. In any event, there is no anomaly. Rule 804(a) addresses various exceptions to the hearsay rule, and it expressly authorizes admission of certain types of hearsay when a witness has a memory loss concerning the underlying events. The issue under Rule 801(d)(1)(C), in contrast, is whether memory loss precludes the admission of a pretrial identification. There is nothing anomalous about the fact that a certain kind of memory loss renders hearsay *admissible* under Rule 804 yet does not render identification evidence *inadmissible* under Rule 801(d)(1)(C).

Respondent cites nothing in the history of the Rule to suggest that Congress's choice of words does not accurately reflect its intent. Rather, as we have demonstrated (U.S. Br. 41-44), the legislative history is fully consistent with the plain language of the Rule. Congress enacted Rule 801(d)(1)(C) to permit the introduction of pretrial statements of identification in cases in which the witness has suffered a lapse in memory and cannot identify the defendant at the time of trial. See U.S. Br. 42-43. Because Congress sought to permit the admission of evidence in a class of cases in which the witness has suffered a memory loss regarding the crime, it is hardly surprising that Congress chose not to impose the requirement, which was imposed by the court of appeals, that the witness recall "the facts and circumstances underlying the identification," namely, "the reasons why [the witness] made the identification" (Pet. App. 9a). Respondent has offered no good reason for the Court to read into the Rule a requirement that Congress did not enact.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

OCTOBER 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987 — 202-037/60082